Petition

81-1133

No. _____

Office - Supreme Court, U.S.
FILED
DEC 14 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MISSOURI BOARD OF PROBATION AND PAROLE,
DICK MOORE, Chairman
CAROLYN V. ATKINS,
and,
BILL DUNCAN,
Members of the Board,
Petitioners,

v.

JAMES E. WILLIAMS
and
JUNIOR THEOBALD,
Individually and on Behalf of All Other
Persons Similarly Situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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December, 1981

KELLY PRESS, INC., 201 S. Eighth St., Columbia, Missouri Dial 314/449-4163

I

QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment applies to parole release determinations made by the Missouri State Board of Probation and Parole when the parole statute requires that the inmate will be paroled only after the Parole Board arrives at an opinion that there is a probability that parole will not be detrimental to the inmate or the community.

2. Whether the Due Process Clause of the Fourteenth Amendment, if found applicable to Missouri parole release decisions, requires that the prisoner being considered for parole be allowed access to his parole file.

3. Whether, in regard to ruling on whether or not Missouri parole statutes grant an inmate an entitlement to parole protectable by the Due Process Clause of the Fourteenth Amendment, the lower courts should have abstained until the Missouri courts had an opportunity to interpret those statutes.

LIST OF ALL PARTIES

1. Petitioners, who were cross-appellants and defendants below, are the Missouri State Board of Probation and Parole, Chairman Dick Moore and members, Carolyn V. Atkins and Bill Duncan.

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Attorneys for Petitioners.

2. Respondents, who were appellants and plaintiffs below, are James E. Williams and Junior Theobald, as named parties, and all persons similarily situated.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinion sought to be reviewed has not yet been published and was styled and numbered as follows: *James E. Williams* and *Junior Theobald,* Individually and on Behalf of all Other Persons Similarly Situated, appellants and cross-appellees v. *Missouri Board of Probation and Parole, W. R. Vermillion,* Chairman; *F. N. Strum* and *Dick Moore,* Members of the Board, appellees and cross-appellants, Nos. 80-1728 and 80-1788, decided October 9, 1981.

The District Court opinion has not been reported. It was styled the same as the above-cited Eighth Circuit opinion and was numbered 74-125-W-2. It was decided on July 21, 1980.

This Court's order vacating the judgment of the United States Court of Appeals for the Eighth Circuit in the first appeal of this case and remanding it for further consideration is found at 442 U.S. 926 (1979).

The first appeal of this case is reported at *Williams* v. *Missouri State Board of Probation and Parole,* 585 F.2d 922 (8th Cir. 1978).

The first District Court opinion is reported at 444 F.Supp. 773 (W.D.Mo. 1978).

GROUNDS OF JURISDICTION

The date of the judgment of the United States Court of Appeals for the Eighth Circuit of which this petition seeks review is dated October 9, 1981. No motion for rehearing was filed. The statutory authority for this Court to review the judgment by way of petition for writ of certiorari is found at 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Amendment XIV, Section 1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws."

Section 549.234.3, RSMo 1978:

> "The orders of the board shall not be reviewable except as to compliance with the terms of sections 549.205 to 549.291."

Section 549.261, RSMo 1978:

> "1. When in its opinion there is reasonable probability that the prisoner can be released without detriment to the community or to himself, the board shall release or parole any person confined in any correctional institution administered by state authorities. All paroles shall issue upon order of the board, duly adopted.
>
> 2. Any person who has been committed to a penal or correctional institution under the administration of the division of corrections, who has served either one-third of his time or twelve months of the time for which he was sentenced, whichever is a shorter period, in an orderly and peaceable manner without having any infraction of the rules or laws of the institution recorded against him shall be eligible to make application for parole and shall be given a hearing. Any person who has served two-thirds of his time or two years of the time for which he was sentenced, whichever is the shorter period, shall be eligible to make application for parole and shall be given a hearing. Paroles may be granted, however, before the minimum period specified has been served.
>
> 3. Before ordering the parole of any prisoner, the board shall have the prisoner appear before it and shall interview him. A parole shall be ordered only for the best interest of society, not as an award of clemency; it shall not be considered a reduction of sentence or a pardon. A prisoner shall be placed on parole only when the board believes that he is able and willing to

fulfill the obligations of a law-abiding citizen. Every prisoner while on parole shall remain in the legal custody of the institution from which he was released but shall be subject to the orders of the board.

4. The board may adopt such other rules not inconsistent with law as it may deem proper or necessary, with respect to the eligibility of prisoners for parole, the conduct of parole hearings or conditions to be imposed upon parolees. Whenever an order for parole is issued it shall recite the conditions thereof."

STATEMENT OF THE CASE

Preliminary Statement

This petition for writ of certiorari seeks review of the above referenced judgment of the United States Court of Appeals for the Eighth Circuit which reversed the District Court judgment in which the District Court had denied plaintiffs' request for declaratory judgment and injunctive relief under 42 U.S.C. § 1983. There were no damages requested. The complaint was filed on March 19, 1974, and was later certified as a class action pursuant to Rule 23(b)(2), Federal Rules of Civil Procedure. Petitioners (Parole Board), on April 26, 1974, filed a motion to dismiss claiming there was a pending state proceeding which involved the issue of whether or not the procedural safeguards of the due process clause of the Fourteenth Amendment were applicable to parole release proceedings. *James E. Williams* v. *W. R. Vermillion,* No. 26693 (Circuit Court of Cole County, Missouri). On May 6, 1974, the Circuit Court of Cole County dismissed the *Williams* case. On May 31, 1974, the United States District denied the motion to dismiss. On October 3, 1974, the Parole Board filed a motion to reconsider the denial of the motion to dismiss on the basis that the named plaintiffs in the instant suit had voluntarily dismissed their respective suits in state court. In fact,

Theobald had his attorney dismiss the appeal from his state circuit court action. The District Court denied the motion to reconsider on January 30, 1975.

Prior to trial the parties arrived at an extensive stipulation of fact and of legal issues. The legal issues were whether the procedural Due Process protections of the Fourteenth Amendment were applicable to parole release determination proceedings conducted by the Missouri State Board of Probation and Parole and, if so, what minimum protections were necessary. The case was tried by the Honorable William H. Collinson of the United States District Court for the Western District of Missouri on August 17 and 18, 1976. On January 17, 1978, the Court held that the procedural protections of the Fourteenth Amendment of the United States Constitution do not adhere to the plaintiffs' interest in the possibility of conditional release on parole and are not mandated by that amendment in relation to proceedings conducted by the Missouri State Board of Probation and Parole in its parole release determinations. The injunctive and declaratory relief sought was denied and judgment was entered in favor of the Parole Board.

Appealed by the plaintiffs, the judgment was reversed and remanded to the District Court for further proceedings in an opinion reported at 585 F.2d 922 (8th Cir. 1978). The Court of Appeals held that due process protections were applicable for the same general reasons as that court had set forth in its decision of *Inmates of Nebraska Penal and Correctional Complex* v. *Greenholtz*, 576 F.2d 1274 (8th Cir. 1978). The Court of Appeals found, in addition, that minimum due process protections required the disclosure of prisoners' parole files to them in preparation for the parole release proceedings. The Parole Board filed a petition for writ of certiorari in this Court and, after this Court reversed the Court of Appeals in *Green-*

holtz v. *Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), it also vacated this case and remanded it for reconsideration in light of *Greenholtz*. See order issued at 442 U.S. 926 (1979). The Court of Appeals remanded the cause to the District Court which ordered briefs on the questions of abstention and of due process analysis in light of the *Greenholtz* opinion.

The District Court found that under *Greenholtz* the Missouri statutes provided no entitlement to parole protectable by the Due Process Clause of the Fourteenth Amendment and entered judgment for the defendants. The prisoners appealed to the United States Court of Appeals for the Eighth Circuit with the Parole Board filing a cross-appeal on the issue of abstention. On October 9, 1981, the Court of Appeals reversed and remanded the cause holding that the statutes did provide an entitlement to parole protectable by the Due Process Clause and that one of the minimal due process protections due an inmate was that of having access to his parole file.

Parole Release Determination Procedure

A detailed delineation of the operation of the Missouri State Board of Probation and Parole in its determination of whom to release on parole is contained in the original District Court's opinion at 444 F.Supp. 773. A more concise statement follows.

The availability of parole to Missouri inmates is established by Section 549.261, RSMo 1978, which provides that inmates will be released on parole when, in the opinion of the Board of Probation and Parole, there is reasonable probability that the prisoner can be released without detriment to the community or to himself. The statute sets forth minimum times in which inmates may make applications for parole and in which they may be given a hearing on that application. Parole is not considered a reduction of

sentence or pardon but is to be ordered only in the best interest of society. The board may place an inmate on parole when it believes he is able and willing to fulfill the obligations of the law abiding citizen. While on parole, the parolee is in the legal custody of the institution from which he was released and is subject to the orders of the Board. The Board referred to contains three members appointed by the Director of the Department of Social Services with the approval of the Governor and with the advice and consent of the Senate.[1] During most of the pendency of this lawsuit, W. R. Vermillion was the Chairman of the Board with Ferd Sturm and Dick D. Moore being the other two Members. Since the original District Court decision, the membership of the Board has undergone several changes and is now constituted of Dick Moore as Chairman, and Carolyn V. Atkins and Bill Duncan as the remaining members.

Within thirty days after an inmate has been assigned to an institution within the Division of Adult Institutions,[2] he will receive a written notice informing him of the month and year in which his parole hearing will be held. He will be notified in writing of the exact date forty-five days prior to the hearing. Before his initial hearing the inmate is interviewed by an institutional parole officer who may, at that time, go over matters in the file with the inmate. The institutional parole officer's pre-parole report summarizes for the Board the matter contained in the files and other information obtained from interviews with the inmate and other individuals such as personnel in the Division of

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[1]As of September 28, 1981, the Board was transferred from the Department of Social Services to a newly created Department of Corrections and Human Resources. Senate Bill No. 52, § 1.2(3), Laws (Missouri) 1981.

[2]Formerly known as Division of Corrections before enactment of Senate Bill No. 52. See note 1, above.

Adult Institutions. The institutional parole officer also evaluates the inmate and makes a recommendation on whether or not he should be released on parole. A hearing is conducted by a three member panel, at least one of which is a parole board member. The other two will be a parole analyst and an institutional parole supervisor. The latter person makes a recommendation as to parole release. The parole analyst helps conduct the hearing, makes recommendations as to a decision, and draws up a written statement of reasons explaining to the inmate the Board's decision and their reasons therefor. Each member of the hearing panel has a copy of the institutional parole officer's report and also has access to the file which is at the hearing. The file contains such matters as the classification report compiled by the Division of Adult Institutions; pre-sentence report; psychiatric and psychological reports, if available; previous institutional parole officer reports; information from previous periods of supervision by the Board; prison disciplinary reports; information concerning any previous time spent in the Division of Adult Institutions; arrest record; references to juvenile proceedings; material and comments sent in gratuitously by concerned law enforcement officials, friends of the inmate and other citizens. There may also be official and community attitude reports done by the Board's field officers in an effort to determine whether or not an inmate can be paroled to a particular locale.

At the hearing, the inmate is allowed to have a representative with him who may be a lawyer. The representative is allowed to make a presentation at the end of the Board's interview with the inmate and to offer any information or arguments on behalf of the inmate. The inmate is also allowed to have a "delegation", that is, other people who want to speak on his behalf. Normally the inmate is not present when the delegation testifies. People opposed to the parole may also present their views to

the Board outside the presence of the inmate. Such a presentation is extremely rare. The proceedings are preserved on tape recordings. After the hearing, a decision is reached on whether to grant parole, put the inmate on parole planning status, deny parole, or set further consideration of the inmate to a later date. If parole is to be granted, the decision must be approved by another member of the Board. If parole is denied or a set back is given, the inmate is given written reasons for that action as prepared by a parole analyst. The reasons are given to the inmate by the institutional parole officer. The inmate may appeal the decision to two members of the Board on the ground that the reasons given for denial or continuance did not support the decision or that there was significant information in existence but not known to the panel at the time of the hearing. The inmate is advised in writing of the appeal decision.

After the initial hearing, an inmate may be set back for a review or another hearing at a later time. A review is exactly the same procedure as described above except that the inmate does not appear before a panel for a hearing. However, persons on his behalf may meet with the Board in their offices and he may send to the Board any information that he feels necessary. He also has the opportunity to communicate with the institutional parole officer when the pre-review interview is being made in order to prepare the pre-review report. Adverse decisions on review may also be appealed in the manner described above.

The rules and regulations of the Board, established under the authority of Section 549.261, RSMo 1978, are not only published in the Code of State Regulations at 13 CSR 80-2, but are published also in booklet form and distributed to the inmates when they arrive in the Division of

Adult Institutions. The regulations and booklet fully describe the above procedures as well as other matters of concern to the inmates in relation to their possibility of being paroled. Among other things, the booklet sets out times that initial hearings are held, hearing and review procedures, general criteria for release on parole, the factors which the Board considers, what is expected of the inmate at the parole hearing and the administrative appeal procedure. Since the proceedings below and this petition do not raise any issue as to the regulations, they are not reprinted in the Appendix.

The basis for Federal jurisdiction of the Court of the first instance, the United States District Court for the Western District of Missouri, was 28 U.S.C. § 1343(3) and (4). Basis for the jurisdiction in the United States Court of Appeals was 28 U.S.C. § 1291.

ARGUMENT

I.

A.

Contrary to Previous United States Supreme Court Opinions

The Court of Appeals' holding on the issue of whether or not Missouri's statute Section 549.261, RSMo 1978, grants inmates an entitlement to parole is in direct conflict with this Court's holding in *Greenholtz* v. *Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), that the Due Process Clause of the Fourteenth Amendment is not applicable to parole release decisions made under state laws which create only a possibility of parole. *Id.* 442 U.S. at 9-11. The Missouri parole statute allows for parole only *after* the Board has determined that parole will not harm the inmate or the community. It contains no language or structure which grants a prisoner the right to parole defeasible only by a parole board decision to the contrary as did the Nebraska statute in *Greenholtz*. Nor does it set out any specific criteria for the Board to follow which require release on parole if those criteria are met.

In maintaining its previous ruling made on the first appeal in *Williams* at 585 F.2d 922 (8th Cir. 1978), which predated this Court's *Greenholtz* decision, the Court of Appeals has so blatently misinterpreted the Missouri statute that it has in effect ruled that a right to parole exists when the statute provides only a possibility of parole release.

The nature of a prisoner's interest in parole must be determined by looking at the statutes involved. The crucial language in Section 549.261 (part of which the Court of Appeals failed to cite) is as follows:

"549.261.1 When in its opinion there is reasonable probability that the prisoner can be released without detriment to the community or to himself, the board shall release or parole any person confined in any correctional institution administered by state authorities. . . .

. . . .

3. . . . A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen. . . ."

The statute requires that the Board form an affirmative opinion that an inmate should be paroled *before* it releases the inmate on parole. The Nebraska statute, in contrast, provided that the Board's opinion, which was formed for the purpose of deciding whether or not to defer as opposed to grant parole, was not to be formed until *after* the inmate was already granted a presumption of parole by the statute. The right to parole granted by the Nebraska statute was defeasible by the Board's opinion that at least one of four specific factors listed in the statute existed. The Missouri statute's wording requires the Board's opinion that the inmate be deserving of parole be made first before any possible entitlement exists.

The Court of Appeals claimed that the language created the same "shall . . . unless" formula as in the Nebraska statute. This rationale had been rejected previously by two Missouri federal district judges. In the instant case, Judge Collinson decided, as he had in his original pre-*Greenholtz* opinion, that Missouri law granted no entitlement to parole. District Judge Scott O. Wright arrived at the same conclusion in *Emmons* v. *State of Missouri,* No. 80-0415-CV-W-5 (W.D.Mo., June 10, 1980), and *Griffin* v. *Atkins,* No. 79-4243-CV-C (W.D.Mo., May 1, 1980), leave to appeal denied in Misc. No. 80-8110 (8th

Cir., July 30, 1980). See Appendix D. These judges explicitly recognized that Missouri's statute treated the Board decision as a "condition precedent" to any possible right the inmate had to release on parole, while in Nebraska the board's decision was a "condition subsequent" to the right to release, operating to take away a right already granted by the statute.

Such a distinction is not a distinction without a difference, as was recognized in *Boothe* v. *Hammock*, 605 F.2d 661 (2nd Cir. 1979), in which the Court of Appeals reversed its pre-*Greenholtz* determination that the due process clause was applicable to New York parole release decisions.

> "Once a legislature has identified as factors relevant to parole release decision-making such amorphous criteria as whether release will depreciate the seriousness of the crime and whether further correctional treatment will enhance the inmate's capacity to be law-abiding, it is difficult to imagine that a board's decisions will be different under a scheme that requires release unless adverse findings based on such criteria are made than under a scheme that simply obligates the board to consider such criteria in exercising its discretion. But one cannot fairly read the majority's opinion in *Greenholtz* without concluding that the majority thought there was not only a difference, but a difference on which entitlement to due process safeguards depends. Despite Justice Marshall's valiant attempt to maintain due process safeguards, the majority could not have called the Nebraska scheme 'unique' if it believed that it resembled the statutes of the 47 other states that identify, as relevant to parole decision-making, the same factors mentioned in the Nebraska statute. The 'shall/unless' formula was decisive for the Court." *Id.* 605 F.2d at 664.

The same result was reached in *Phillips* v. *Williams*, 608 P.2d 1131 (Okla. 1980), reversing a previous decision in the same case at 583 P.2d 488 (Okla. 1978) which had been vacated and remanded for reconsideration in light of *Greenholtz*.

The Court of Appeals in the instant case apparently saw some significance in the use of the word "shall" in the first sentence of Section 549.261.1. The word "shall", of course, can mean simply the future of the verb "to be". See Webster's Third International Dictionary, "shall", 2(b) and 3(b) page 2085. Missouri courts have often recognized that "shall" takes on a mandatory meaning only if it is understood to be such within the purpose and intent of its statutory context. The courts have long recognized that the term is used interchangably with "may" and "must" without regard to its literal meaning. *Kansas City, Mo.* v. *J. I. Case Threshing Mach. Co.*, 337 Mo. 913, 87 S.W.2d 195, 205 (banc 1935); *Howard* v. *J. B. Banks*, 544 S.W.2d 601, 604 (Mo.App., St.L.D. 1976); *State ex rel. Schultz* v. *Harper*, 573 S.W.2d 427 (Mo.App., K.C.D. 1978). In the latter case, the word "shall" was used in reference to whether or not a prosecutor should file an information subsequent to the filing of a complaint by a private citizen. The filing of the information was held not to be mandatory because of the traditional discretion accorded a prosecutor. This is analogous to the instant case in which the traditional discretion accorded to the parole board would require that the "shall" not be understood in its mandatory sense. Furthermore, the use of the word "shall" in this context simply directs the Board to release the inmate on parole *after* it has determined that the inmate is suitable for parole. In the Nebraska statutes, the word "shall" directed the board to parole the inmate *unless* it made a decision that certain factors specified in the statute existed.

Another indication that there is no entitlement to parole in the Missouri statute is the lack of any specific criteria in the statute to guide the Board's discretion. *Connecticut Board of Pardons* v. *Dumschat*, ____ U.S. ____, 101 S.Ct. 2460, 2465, 69 L.Ed.2d 158, 166 (1981); *Shirley* v. *Chestnut*, 603 F.2d 805, 807 (10th Cir. 1979) (interpreting Oklahoma's statute); *Schuemann* v. *Colorado State Board of Adult Parole*, 624 F.2d 172, 174 n.2 (10th Cir. 1980) (interpreting Colorado's statute); and, *Boothe* v. *Hammock, supra* (interpreting New York's statute). The Missouri statute has set out in it only the typically generalized language concerning parole being for the rehabilitation of the inmate and without detriment to the community. In construing the Texas parole statutes, the Court of Appeals for the Fifth Circuit held that language found in those statutes, which is identical to some of the language in the Missouri statutes, shows conclusively that no presumption of entitlement to release on parole is created by the statute: "a parole shall be ordered only for the best interest of society . . . when the Board believes that [the inmate] is able and willing to fulfill the obligations of the law-abiding citizen." Tex. Code Crim. Proc. Art. 42.12 § 15(f) and Section 549.261.3, RSMo 1978. *Williams* v. *Briscoe*, 641 F.2d 274, 276-277 (5th Cir. 1981).

Another indication of the complete and total discretion allowed the Board in its parole determinations is the fact that the Legislature did not dictate any detailed rules for the Board but instead granted the Board the right to set up its own regulations with respect "to the eligibility of prisoners for parole, the conduct of parole hearings or conditions to be imposed upon parolees." Section 549.261.4, RSMo 1978. The Legislature also prohibits orders of the Board from being reviewed except as to compliance with terms of the statutes establishing the Board and parole release. Section 549.234, RSMo 1978.

Clearly then the Missouri statute conditions any right to parole on the Board's making that traditionally predictive and discretionary decision on paroles which was so well described by this Court in *Greenholtz, id.*, 442 U.S. 8, 9-10. The Missouri statutory scheme is no different than the typical parole scheme in which the inmate's release depends entirely on the Board's affirmative decision to release him and which provides only general criteria to guide the Board's discretion. This Court needs to review the Missouri statute and apply the *Greenholtz* rationale in a thorough and studied manner which will make clear to all lower courts interpreting statutes which may contain the word "shall" that such language does not automatically create an entitlement to parole protectable by the due process clause. See Section C, below, for a discussion of the impact of this case on other jurisdictions.

B.

Contrary to Opinions of Other Circuits

The opinion of the Court of Appeals in the instant case is the only pre-*Greenholtz* decision to find an entitlement to parole in a state statute. See Appendix B for a listing of post-*Greenholtz* cases. Because the Court of Appeals paid only lip service to the "shall . . . unless" formula without any foundation for finding that formula existent in Missouri's statutory language and structure, the court's decision clearly conflicts with the opinion of the Second Circuit in *Boothe* v. *Hammock*, 605 F.2d 661 (2nd Cir. 1979), which recognized a distinction between the situations when the opinion of the board *precedes* the granting of parole and when it takes away a presumption of parole already granted by statute. Since the Missouri statute is the same as if it had the word "may" in the first sentence of its first subsection, it conflicts with all the post-*Greenholtz* opinions which have interpreted such statutes. See

Appendix B. Furthermore, insofar as crucial language in the Missouri statute is identical with language in the Texas statute, the Court of Appeals' holding conflicts with *Williams* v. *Briscoe, supra*, in which the Fifth Circuit found that the language was practically conclusive of whether or not there was any entitlement to parole.

C.

General Importance of the Issue

The decision by the Court of Appeals below has a major impact on all jurisdictions having similar statutes especially those using the word "shall". Of particular importance is the impact on the federal parole commission since the federal statute provides that, if an inmate has observed the rules of the institution and if the board determines that his release would not depreciate the seriousness of his offense or promote disrespect for the law and would not jeopardize the public welfare, "such prisoner *shall* be released." (Emphasis added). 18 U.S.C. § 4206(a).

Other states which have statutes using "shall" but with the word "unless" are Iowa, Maine, Montana, Vermont and Virginia. The relevant portions of the statutes of those states have been reprinted in the Appendix C. Of these states, only the Montana statute has been interpreted by a federal court since *Greenholtz* and it has been found not to provide for an entitlement to parole protectable by the due process clause. *Campbell* v. *Montana State Board of Pardons*, 470 F.Supp. 1301 (D.Mont. 1979). While there has been no determinative opinion in regard to the federal statute, the Fifth Circuit has strongly suggested that there is no entitlement to parole. *Shahid* v. *Crawford*, 599 F.2d 666, 670 n.5 (5th Cir. 1979).

The decision below leaves in a confused state exactly how the *Greenholtz* rationale should be applied to those

jurisdictions' statutes which have mandatory language in them but do not contain the explicit "shall . . . unless" formula of the Nebraska statute. The Missouri statute needs examination by this Court to clarify for all lower federal courts how *Greenholtz* should be applied in these situations.

Even before this Court decided *Greenholtz*, petitioner was asking the lower federal courts to adopt the rationale on entitlement eventually enunciated by this Court. The Missouri federal district judge in this case, long experienced in interpreting Missouri laws, agreed that no entitlement existed. Since the *Greenholtz* decision, that judge, and another Missouri federal judge have arrived at the same decision. Their decisions can hardly be considered logically and rationally refuted by a Court of Appeals decision which does not address the entire statute nor even discuss cases from other circuits which arrive at contrary conclusions. The state is having its statute interpreted in a way in which it never has been interpreted before and in a way in which the parole board never anticipated that it would be interpreted. The state asks the highest court of this land to apply those *Greenholtz* principles to the Missouri statute which Missouri has in fact been seeking to establish since practically the beginning of this case.

II.

The Court of Appeals' decision sought to be reviewed here is unique in another way in that it held that the prisoner has a right of access to his parole file qualified by security considerations. This was a point explicitly left open by this Court in *Greenholtz*. *Id.* 442 U.S. at 15 n.7. Of those Courts of Appeals which have considered the question both before and after *Greenholtz*, the Court of Appeals below is in direct conflict with all the other courts.

This is despite the fact that there was no factual showing in the proceedings in the District Court that the parole release determination process was rendered any less factually accurate by the procedure of not allowing inmates access to their parole files.

The Court of Appeals' decision is in conflict with the ruling in the post-*Greenholtz* case of *Schuemann* v. *Colorado State Board of Adult Parole,* 624 F.2d 172, 175 (10th Cir. 1980), and the pre-*Greenholtz* cases of *Franklin* v. *Shields,* 569 F.2d 784 (4th Cir. 1977), *rev'd on access to files issue en banc,* 569 F.2d 800 (1978), *cert. denied,* 435 U.S. 1003 (1978); *Fronczak* v. *Warden, El Reno Reformatory, El Reno, Oklahoma,* 553 F.2d 1219, 1220-1221 (10th Cir. 1977); *Billiteri* v. *United States Board of Parole,* 541 F.2d 938, 945 (2nd Cir. 1976). *Accord, Sites* v. *McKenzie,* 423 F.Supp. 1190, 1196 (N.D.W.Va. 1976). Petitioners would particularly direct this Court's attention to the en banc decision in *Franklin* v. *Shields, supra,* in which access to files was held not part of the minimal procedures required even though factual mistakes had been shown to exist in the parole files. Here, as stated above, no mistakes were found in the files.

Because of the clear cut conflicts between the various Courts of Appeals on this question and because the Court of Appeals below is in conflict with every other circuit which has considered the question, it would be appropriate for the writ of certiorari to issue in this cause.

III.

Abstention is the discretionary exercise of a federal court's equity powers by which a federal court decides that out of consideration of federalism and comity there is a sufficiently strong interest to abstain adjudication of a constitutional claim otherwise properly before that

court in order to give the state courts an opportunity to adjudicate the state law issues upon which are predicated the constitutional claims. *Moore* v. *Sims*, 442 U.S. 415, 427-428 (1979). In the instant case, the Court of Appeals refused to reverse the District Court on the issue of abstention, brushing aside the Parole Board's arguments on its cross-appeal with a footnote simply citing *Greenholtz* v. *Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 12 (1979), wherein this Court noted the fact that there had been no judicial interpretation of Nebraska's parole statutes by the Nebraska state courts. The issue of abstention had not been raised in the *Greenholtz* case. This Court simply noted that Nebraska, which was the petitioner in that case, was asking this Court to construe Nebraska's parole statutes, without there having been any state court guidance provided. Therefore, the cite to *Greenholtz* does not explain why the Court of Appeals in the instant case failed to even discuss the abstention claim on cross-appeal. Such a cursory treatment is tantamount to a failure even to consider the cross-appeal.

The failure of the lower federal courts to abstain is in direct conflict with the principles enunciated in *Moore* v. *Sims*, *supra* and *Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289 (1979). Both cases established principles concerning when it is proper, or even required, for federal courts to abstain in civil rights cases when there are broad based challenges to state statutory schemes. The primary principle violated was that established in the *Babbitt* case. When state law is " 'fairly susceptible to an interpretation which will render unnecessary or substantially modify the federal constitutional question' . . . abstention may be required 'in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law and premature constitutional adjudication' . . .

[Citation omitted]." *Babbitt* v. *United Farm Workers National Union, id.*, 442 U.S. at 306. The *Babbitt* case concerned an attack on the constitutionality of the criminal penalty provisions and consumer publicity provisions of the Arizona Agricultural Employment Relations Act. The court held that the federal district court should have abstained so that state courts could have had the opportunity to interpret the criminal penalty provisions in a way to undercut or modify the attack for vagueness. Furthermore, the district court should have abstained from deciding the consumer publicity provision of the Act because the state courts may have decided that these provisions apply only to deliberate or recklessly made misrepresentations.

This Court has identified three distinct considerations calling for abstention in broad-based challenges to state statutory schemes. First, federal courts should not be forced to interpret state law without the benefit of state court consideration and under circumstances where the constitutional determination is predicated on a reading of the state statute that is not binding on state courts and may be discredited at any time by those courts, rendering the federal court decision advisory and litigation meaningless. Second, there is need for a concrete case or controversy. Third, there is a threat to the federal system by needless obstruction to the state's policies by forestalling state action in construing and applying its own statutes. *Moore* v. *Sims, id.*, 442 U.S. at 427-427. *Moore* involved an injunction issued by a federal court on behalf of the parents who had had their parental rights terminated temporarily by a Texas state court, which injunction prohibited the Texas courts from proceeding any further with their parental rights adjudication proceedings. This Court held that abstention was required because of a pending state court proceeding which was adequate to adjudicate the parents' constitutional claims. In the instant case, there

is presently pending no state court adjudication by either of the two named plaintiffs although there is a state court suit pending which was filed by one of the members of the class in this suit. Furthermore, plaintiff Williams had a state court suit pending at the time the federal action was filed and plaintiff Theobald had an appeal pending from an adverse ruling against him in a state court suit involving issues identical to those in the federal suit. After the federal suit was filed, both plaintiffs dismissed their state court cases. As described in the Statement of the Case above, the Parole Board, early in this case, twice asked the District Court to abstain, but on neither occasion did it do so. The abstention question was again briefed by order of the district court after remand from this Court subsequent to the *Greenholtz* opinion, but was not mentioned in that court's final opinion. Nevertheless, whether there was a pending state proceeding at this time or not, the considerations concerning abstention discussed so thoroughly in the Moore opinion, would be just as applicable to the instant case as shown by their application in the *Babbitt* case.

This Court's opinion in *Greenholtz* finally resolved the issue concerning the application of the due process clause to parole release determinations by requiring an analysis of state law to determine whether or not an entitlement to parole had been created. Before that, federal courts which had been finding the due process clause applicable had been doing so generally on the basis that a statute creating the possibility of parole was sufficient to justify application of that clause. Once *Greenholtz* was decided and it became clear that the due process issue was one requiring an interpretation of the state's parole statutes, the District Court in the instant case, as well as the Court of Appeals, should have been even more aware of the applicability of the abstention principles enunciated that same

year in *Babbitt* and *Moore*. The issue in this case became a classic example of when a federal court should abstain. Whether or not there is entitlement to parole in Missouri depends solely on an interpretation of the state statutes setting up the parole release system. In this case, the named plaintiffs deprived the appellate courts of Missouri of an opportunity to make a definitive ruling on the subject by dismissing their state court cases.

State courts are supposed to be the principal expositor of state law with federal courts being bound by their interpretation of state laws unless the state court interpretation was an "obvious subterfuge" to avoid consideration of a federal issue. *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 n.11 (1975). The federal court is bound by clear expressions of the state legislature as to whether entitlement is intended or by state court interpretations of the law if there exists no clear legislative expression. See *Averhart* v. *Tutsie*, 618 F.2d 479 (7th Cir. 1980), in which the court accepted the Indiana Supreme Court's interpretation of the parole statutes concerning entitlement; and, *Wetzel* v. *Edwards*, 635 F.2d 283, 289 (4th Cir. 1980), wherein the court held that it was bound by the North Carolina Supreme Court's holding that inmates had no liberty interest in status changes within the correctional system or in parole. In the instant case, the lower federal courts have avoided allowing the state courts the opportunity to interpret the state's own statute. As long as the federal class action is pending, Missouri courts cannot consider the issues presented, as was the case with Texas in *Harris County Commissioners Court* v. *Moore*, 420 U.S. 77, 88-89 n.14 (1975). See *State ex rel. Bowling Green Trust Co.*, v. *Barnett*, 235 Mo. 99, 149 S.W. 311, 317-318 (banc 1912).

The instant case involved a broad-based challenge to the procedures utilized in parole release determinations.

Although a number of these procedures were independently adopted by the Board over the course of years during the pending litigation, the Court of Appeals remanded the case back to the District Court for consideration of not only setting up a system by which the inmates would have access to their parole files, but also to determine "what procedural safeguards are necessary in the circumstances of this case to comport with due process. . . ." Issuance of a decree and supervision of the enforcement of that decree would involve a federal court in managing the parole release process of the State of Missouri. This degree of involvement in State administrative and correctional matters is contrary to public policy, especially when abstention could avoid such problems. *Rizzo* v. *Goode*, 423 U.S. 362, 379-380 (1976); *Cicero* v. *Olgiati*, 426 F.Supp. 1213, 1218-1219 (S.D.N.Y. 1976); *Meachum* v. *Fano*, 427 U.S. 215, 228-229 (1976); *Ahrens* v. *Thomas*, 570 F.2d 286, 289-290 (8th Cir. 1978).

Ironically, Courts of Appeals' cases addressing this issue and resolving the matter in favor of abstention are from the Court of Appeals below, although from a panel different from that sitting in the instant case. In *George* v. *Parratt*, 602 F.2d 818 (8th Cir. 1979), the court held that abstention was proper in a case in which two Nebraska inmates claimed that the warden had refused to grant them good time credits towards their sentences. This warden was not giving them good time credit accruing under Nebraska statutory law, which had been previously recognized by the federal courts as giving inmates entitlement deserving of due process safeguards. The warden denied the credits because of his interpretation of that law in relation to those inmates being sentenced to indefinite terms under Nebraska's Sexual Sociopath Act. Adjudication of the claim required an interpretation of the interplay between the good time credit statute and the Sexual Sociopath Act.

Both the District Court and the Court of Appeals agreed that they should abstain.

In another case, *Coley* v. *Clinton,* 635 F.2d 1364 (8th Cir. 1980), the Court of Appeals reversed the district court and ruled that it should have abstained in regard to claims involving rights of state mental patients who were alleging due process violations relating to their confinement.

The Court of Appeals' decision in the instant case was contrary to the principles of abstention laid down by this Court and contrary to the manner in which this Court has applied them. Since the *Greenholtz* opinion, the manner in which the principles of abstention should apply when state parole statutes are being interpreted to determine whether or not a constitutional right has been created is of particular importance. Petitioner urges this Court to issue its writ of certiorari and review the question of abstention.

CONCLUSION

For the foregoing reasons, petitioner requests this Court to issue its writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1728

James E. Williams and Junior Theobald, Individually and on behalf of all other persons similarly situated,
Appellants,

v.

Missouri Board of Probation and Parole, W. R. Vermillion, Chairman; F. N. Strum and Dick Moore, Members of the Board,
Appellees.

No. 80-1788

James E. Williams and Junior Theobald, Individually and on behalf of all other persons similarly situated,
Appellees,

v.

Missouri Board of Probation and Parole, W. R. Vermillion, Chairman; F. N. Strum and Dick Moore, Members of the Board,
Appellants.

Appeals from the United States District Court for the Western District of Missouri.

Submitted: April 13, 1981

Filed: October 9, 1981

Before BRIGHT, HENLEY and ARNOLD, Circuit Judges.

HENLEY, Circuit Judge.

James E. Williams and Junior Theobald[1] appeal the decision of the district court holding that the Missouri parole statute, Mo. Rev. Stat. § 549.261, does not create a protected liberty interest in release on parole. We reverse the judgment and remand the case to the district court.

Appellants brought this civil rights action, 42 U.S.C. § 1983, in March, 1974 while they were incarcerated in the Missouri State Penitentiary at Jefferson City. A stipulation of facts and legal issues into which the parties entered in July, 1976 focused the controversy on whether the due process clause of the fourteenth amendment applied to parole release determinations and, if so, whether the Missouri procedures were constitutionally adequate. After a trial, the district court ruled in favor of the Board of Probation and Parole.[2] This court reversed the district court's decision, holding that "the inmate's right to be considered for parole involves his liberty interest and must

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[1]Appellants are the designated representatives of a class consisting of all inmates in Missouri penal institutions who are or will be subject to the jurisdiction of the Missouri Board of Probation and Parole and who will appear before the Board for a parole release hearing. At the time the cause was certified as a class action, appellants were incarcerated in the Missouri State Penitentiary at Jefferson City. Williams was released on parole in 1975. Theobald was paroled in January, 1978.

[2]After trial but before the district court rendered its decision, the Board adopted certain rule changes relating to the relief sought by appellants.

not be abrogated without compliance with the minimum due process procedures required under the circumstances." *Williams* v. *Missouri Board of Probation and Parole*, 585 F.2d 922, 924-25 (8th Cir. 1978) (citations omitted), *vacated and remanded*, 442 U.S. 926 (1979). On the Board's successful petition for certiorari, the United States Supreme Court vacated this court's judgment and remanded the case for further consideration in light of the decision in *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979). *See Williams* v. *Missouri Board of Probation and Parole, supra*, 442 U.S. at 926. This court subsequently remanded the cause to the district court, which again concluded that the Missouri statute did not create a protected expectation of release on parole. Williams and Theobald now appeal this decision, contending that the due process clause applies to parole release determinations in Missouri. In addition, appellants argue that due process requires that an inmate be allowed access to his parole file before parole release hearings and reviews[3] to correct, rebut, or explain any adverse information contained in the file.[4]

We conclude that inmates of Missouri penal institutions have a protected liberty interest, rooted in state law, in parole release. The Missouri parole statute, Mo. Rev. Stat. § 549.261, provides:

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[3]An inmate appears personally at a parole hearing. A decision following a review, however, is based solely on the information contained in the file.

[4]The Missouri Board of Probation and Parole has also cross-appealed the district court's implicit decision not to abstain in this cause. It is clear that abstention was neither required nor warranted under the facts of this case. Thus, without further discussion, we reject cross-appellant's argument in this regard. *See Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 12 (1979).

> When in its opinion there is reasonable probability that the prisoner can be released without detriment to the community or to himself, the board shall release on parole any person confined in any correctional institution administered by state authorities. . . .[5]

Like the language of the Nebraska parole statute, Neb. Rev. Stat. § 83-1,114(1), considered in *Greenholtz, supra,* 442 U.S. at 1, this language created a justifiable expectation that if the statutory criteria are satisfied, the inmate will be released on parole. The Nebraska parole provision at issue in *Greenholtz* provided:

> Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:
>
> (a) There is a substantial risk that he will not conform to the conditions of parole;
>
> (b) His release would depreciate the seriousness of his crime or promote disrespect for law;
>
> (c) His release would have a substantially adverse effect on institutional discipline; or
>
> (d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

Neb. Rev. Stat. § 83-1,114(1). In considering this statute, the Court found that its "unique structure and language" created an expectancy of release entitled to "some measure of constitutional protection." *Greenholtz, supra,* 442 U.S.

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[5]The Board of Probation and Parole has adopted detailed guidelines to aid its parole release decisions. *See* 13 C.S.R. § 80-2.010(5) (1980).

at 12. After examining the similar Missouri provision in the light cast by the *Greenholtz* decision, we conclude that the Missouri law providing that *when* the statutory and regulatory guidelines are met the inmate *shall* be released on parole gives rise to the same protectible entitlement as the Nebraska scheme providing that the prisoner *shall* be paroled *unless* certain findings are made. *Compare* Mo. Rev. Stat. § 549.261 *with* Neb. Rev. Stat. § 83-1,114(1).

Having concluded that the due process clause is implicated, we must now determine whether inmates in Missouri penal institutions must be allowed access to their parole files. The parties in this case stipulated that the parole file contains the presentence report; psychiatric and psychological reports if available; prereview and progress reports;[6] and information concerning any prior juvenile proceedings, arrests, confinement, probation, or parole. The file may also contain newspaper articles concerning the inmate's trial or conviction and comments by law enforcement officials, the sentencing judge, or individuals who wish to support or protest a particular application for parole.

Although the Board of Probation and Parole has the discretionary authority to allow the inmate or his attorney to inspect certain privileged and confidential reports

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[6]The parties also stipulated that "[a]fter reviewing the parole file and interviewing the inmates, institutional parole officers prepare 'progress reports' prior to scheduled parole hearings and 'prereview reports' prior to scheduled reviews." These reports generally contain summaries of the inmate's criminal and social history and of psychiatric and psychological reports (if available); a description of his institutional progress including information about infractions, his attitude, and his participation in institutional programs; a description of his plans after he is released on parole; and an evaluation of the inmate and a recommendation concerning parole release by the institutional parole officer.

contained in the parole file,[7] Mo. Rev. Stat. § 549.285, the Board's policy is not to disclose any information in the files.[8] *See* Mo. Rev. Stat. § 549.151. As a policy matter the Board also does not advise inmates of adverse information submitted by judges, prosecutors, law enforcement personnel, or other persons. Further, it concedes that institutional parole officers, who interview inmates before parole hearings and reviews and summarize the contents of the parole files, do not have the time or resources to make independent investigations to verify the information given them by sources inside and outside the institution. Since there is no formal procedure by which the inmate can determine the existence of adverse information in the file, he remains unaware of it unless the matter is raised by a member of the hearing panel during the hearing. Any adverse materials placed in the file after an initial hearing resulting in a denial of parole simply remain out of the inmate's reach during subsequent parole reviews since such reviews are conducted without input from the inmate.

It is clear that the current Missouri policy presents a virtually insurmountable barrier for an inmate seeking

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[7]Section 549.285 of the Missouri Revised Statutes provides:

> The presentence report, the preparole report and the supervision history, obtained in the discharge of official duties by any member or employee of the board, shall be privileged and shall not be disclosed directly or indirectly . . . , except that the board or court may at their discretion permit the inspection of the report or parts thereof by the defendant or prisoner or his attorney . . . whenever the best interest or welfare of a defendant or prisoner makes the action desirable or helpful.

[8]Dick D. Moore, a member of the Missouri Board of Probation and Parole at the time of trial in 1976, testified that the current Board policy of denying inmates access to their parole files is based on the Board's interpretation of the Missouri "sunshine" law, which authorizes any proceeding or record dealing with parole to be closed, Mo. Rev. Stat. § 610.025. The need for preserving the confidentiality of sources of information necessary for the parole decision is also articulated as a reason for the Board's no access policy.

to discover the existence of adverse factual information contained in his parole file. Inaccurate information in the file that remains unverified or unrebutted inflates the risk of erroneous decisions and could thus flaw the decisionmaking process. *See Greenholtz, supra,* 442 U.S. at 13. In our initial consideration of this case we stated:

> We are convinced that as a minimum due process requires that an inmate in Missouri seeking parole be advised of adverse information in his file. In order for an inmate to have a meaningful consideration of his application for parole it is essential that he be apprised of such adverse information and given an opportunity to rebut or explain the parts he believes are incorrect. . . .

Williams v. *Missouri Board of Probation and Parole, supra,* 585 F.2d at 925. We remain convinced that due process imposes the requirement that an inmate be advised of adverse information that may lead to an unfavorable decision and given an opportunity to address it.

In reaching this result, we recognize the state's strong and legitimate interests in preserving the confidentiality of sources of information necessary for parole release decisions[9] and in maintaining security and discipline within its institutions. Our decision in no way seeks to abrogate or minimize these interests.

We remand this case to the district court for a decision on the question what procedural safeguards are necessary in the circumstances of this case to comport with due process, including the requirement that an inmate be advised of adverse information that may lead to

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[9]In their brief, appellants also recognize that important state interests may militate against disclosure of some items contained in the parole file.

an unfavorable decision and given an opportunity to address it. On remand the court may take additional evidence, if necessary, and should consider the relevant Missouri statutes, the Board's current rules and regulations, the evidence of record, the *Greenholtz* decision, and the instant decision. It should then remand the case to the Missouri Board of Probation and Parole for promulgation of regulations implementing the guidelines set forth in the court's decision.

Reversed and remanded.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

WESTERN DISTRICT

JAMES E. WILLIAMS and JUNIOR THEOBALD, Individually and on behalf of all other persons similarly situated, *Plaintiffs,* vs. MISSOURI BOARD OF PROBATION AND PAROLE, et al., *Defendants.*	No. 74CV125-W-2

ORDER DIRECTING ENTRY OF FINAL JUDGMENT

This civil rights class action was filed by two inmates at the Missouri State Penitentiary. The plaintiffs attempted, through this action, to have the State of Missouri's parole procedures declared to be in violation of the due process clause of the fourteenth amendment. The action was tried to this Court on August 17, 1976. In a memorandum opinion filed January 17, 1978, this Court found all issues in the case in favor of defendants and against plaintiffs. Plaintiffs appealed this Court's January 17, 1978, decision to the Court of Appeals, which reversed this Court's January 17, 1978 decision. Defendants filed a petition for writ of certiorari, which was granted by the Supreme Court. On July 16, 1979, the Supreme Court vacated the judgment of the Court of Appeals

and remanded the action for consideration of the Supreme Court's decision in *Greenholt* v. *Inmates of Nebraska Penal Complex,* 422 U.S. 1 (1979) (hereinafter *Greenholtz*). In an order entered July 18, 1979, the Court of Appeals remanded the action to this Court for consideration in light of *Greenholtz.*

This Court carefully reviewed the Supreme Court's Opinion in *Greenholtz* and determined that the only possible question left for consideration in this case is the question whether Missouri's present parole statute creates a sufficient expectation of release on parole to require, under the fourteenth amendment, some procedural protections not presently provided under Missouri's parole release procedures. This Court directed the parties to brief their respective positions on this question. The parties have submitted their briefs, and the cause pends for determination.

After consideration of the Supreme Court's Opinion in *Greenholtz,* and the parties' suggestions in support of their respective positions, this Court is convinced that final judgment in favor of defendants should be entered in this action. Unlike the language of the Nebraska statute involved in *Greenholtz,* a statute which the Supreme Court characterized as having "unique structure and language," the Missouri parole statute does not create a protectible expectation of release on parole. As recently indicated in *Booth* v. *Hammock,* 605 F.2d 661 (2d Cir. 1979), "[t]he only characteristic of the Nebraska statute that the Court mentioned as relevant to [the conclusion that protectible expectations were created by the Nebraska statute] was the requirement that release 'shall' be ordered 'unless one of four disqualifying conditions is found to exist.' " *Booth* v. *Hammock, supra* at 663. That language, in effect, was held to create a situation analogous to a condition subse-

quent as found in property and contract law; the entitlement to parole vested unless conditions existed to defeat that entitlement. Here, however, the Missouri statute creates an entitlement to parole *only* if the Board finds "in its opinion there is reasonable probability that the prisoner can be released without detriment to the community or to himself," the equivalent to a condition precedent. The language of the statute and the broad discretion conferred upon the Board by its terms is decisive. "One cannot fairly read the majority's opinion in Greenholtz without concluding that the majority thought there was not only a difference, but a difference on which entitlement to due process safeguards depends." *Booth* v. *Hammock, supra* at 664. On this basis, it has been held that the statutes of other states do not create an expectation of parole release sufficient to trigger due process procedural protections. See, *Booth* v. *Hammock, supra* (New York statute); *Smith* v. *Shoemaker*, 615 F.2d 1362 (6th Cir. 1980) (Ohio statute); *Wagner* v. *Gilligan*, 609 F.2d 866 (6th Cir. 1979) (Ohio statute); *Shirley* v. *Chestnut*, 603 F.2d 805 (10th Cir. 1979) (Oklahoma statute;); *Austin* v. *Armstrong*, 473 F. Supp. 1114 (D. Nev. 1979) (Nevada statute); *Parisie* v. *Irving*, ____ F. Supp. ____ (N.D. Ill., No. 80-C-131, 1/22/80) (Illinois statute); and *Campbell* v. *Montana State Board of Pardons*, 470 F. Supp. 1301 (D. Mont. 1979) (Montana statute). But see, *Dumschat* v. *Board of Pardons*, ____ F.2d ____ (2d Cir., No. 78-2124, 11/16/79) (applying a statistical approach to the Connecticut statute).

In *William* v. *Missouri Board of Probation and Parole*, 585 F.2d 922 (8th Cir. 1978), our Court of Appeals stated, "[a]lthough it is true that the language of the Nebraska and Missouri statutes is not identical, the statutes are similar in crucial aspects" in that "both statutes state that it is up to the Board to determine when parole should be granted," that "both statutes provide that every inmate

has the right to be considered for parole and have a hearing after meeting the eligibility standards prescribed by the statutes," and that "both statutes anticipate that an inmate is to be released on parole unless he fails to meet certain statutory guidelines." 585 F.2d at 924. The language of the Missouri statute, however, appears to create significantly more discretion on the part of the Missouri Parole Board to grant or deny release on parole than did the Nebraska statute in *Greenholtz*. Parole release is to be granted only after the Board is satisfied "in its opinion" that "there is reasonable probability that the prisoner can be released without detriment to the community or himself." R.S.Mo. § 549.261 (1965). That finding is a prerequisite to parole release. Unlike the Nebraska statute, discussed in *Greenholtz*, an expectation to parole release does not arise under the Missouri statute until that specific finding is made by the Board. Based upon the rationale of *Greenholtz*, and in light of the substantial differences between the language of the Nebraska statute construed in *Greenholtz* and the language of the Missouri parole statute, this Court holds that the Missouri parole statute does *not* create a protectible expectation of release on parole. Any due process claim concerning Missouri's parole release procedures is, therefore, completely without merit. *Greenholtz, supra.*

Accordingly, this Court having found all issues in favor of defendants, it is

ORDERED that final judgment in favor of defendants be, and hereby is, entered; and it is

ORDERED that the Clerk of Court prepare a form of final judgment in favor of defendants as ordered above.

William R. Collinson
District Judge

Dated: July 21, 1980.

APPENDIX B

Boothe v. *Hammock*, 605 F.2d 661 (2nd Cir. 1979) (New York parole statutes);

Schuemann v. *Colorado State Board of Adult Parole*, 624 F.2d 172 (10th Cir. 1980) (Colorado parole statutes);

Candelaria v. *Griffen*, ____ F.2d ____ (No. 80-1119, 10th Cir. 1981) (New Mexico parole statutes);

Shirley v. *Chestnut*, 603 F.2d 805 (10th Cir. 1979 (Oklahoma parole statutes);

Phillips v. *Williams*, 608 P.2d 1131 (Okla. 1980) (Oklahoma parole statutes);

Averhardt v. *Tutsie*, 618 F.2d 479 (7th Cir. 1980) (Indiana parole statutes);

Wagner v. *Gilligan*, 609 F.2d 866 (6th Cir. 1979) (Ohio parole statutes);

Sharp v. *Leonard*, 611 F.2d 136 (6th Cir. 1979) (Ohio parole statutes);

Williams v. *Briscoe*, 641 F.2d 274 (5th Cir. 1981) (Texas parole statutes);

Campbell v. *Montana State Board of Pardons*, 470 F.Supp. 1301 (D.C. 1979) (Montana parole statutes);

Robinson v. *Mabry*, 476 F.Supp. 1022 (E.D.Ark. 1979) (Arkansas parole statutes);

United States ex rel. McCalvin v. *Irving*, 504 F.Supp. 368 (C.D.Ill. 1980) (Illinois parole statutes);

Parisie v. *Irving*, No. 80-C-131 (N.D.Ill., Jan. 22, 1980) (Illinois parole statutes);

Schrapshier v. *Florida Parole and Probation Commission*, P.C.A. 80-0418 (N.D.Fla., May 2, 1980) (Florida parole statutes);

Austin v. *Armstrong*, 473 F.Supp. 1114 (D.Nev. 1979) (Nevada parole statutes);

Murphy v. *Indiana Parole Board*, 397 N.E.2d 259 (Ind. 1979) (Indiana parole statutes).

APPENDIX C

Iowa: "The Board shall release on parole any person whom it has the power to so release, when in its opinion there is reasonable probability that such person can be released without detriment to the community or to himself or herself." Iowa Code Ann. § 906.4

Maine: "The Board shall, in accordance with applicable provisions of this chapter: A. Determine the time of parole in the case of each inmate and prisoner." Me. Rev. St. tit 34, § 1552

Montana: "Subject to the following restrictions, the board shall release on parole by appropriate order any person confined in the Montana State Prison, except persons under sentence of death and persons serving sentences imposed under 46-18-202(2), when in its opinion there is reasonable probability that the prisoner can be released without detriment to himself or to the community." Montana Rev. Codes Ann. § 46-23-201

Vermont: "After an inmate has served the minimum term of his sentence, if any minimum has been established, less any reductions for good behavior which have been computed in accordance with Section 811 of this Title, he shall be released on parole by the written order of the board if the board determines there is reasonable probability that the inmate can be released without detriment to the community or to himself." Vt. Stat. Ann. tit 28, § 1051(a).

Virginia: "[T]he board shall, subject to other provisions of this chapter: . . . release on parole . . . persons convicted of felonies and confined under the laws of the commonwealth in any penal institution in the commonwealth when such persons become eligible, and are found suitable for parole." Va. Code § 53-238

APPENDIX D

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

WESTERN DIVISION

EDWARD RANDALL EMMONS,
Petitioner,

vs.

STATE OF MISSOURI and
MISSOURI BOARD OF
PROBATION AND PAROLE,
Respondents.

Case No. 80-0415-CV-W-5

MEMORANDUM AND ORDER

Petitioner, who is currently confined at the Missouri State Penitentiary in Jefferson City, Missouri, has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 (1976), alleging that the Missouri statute concerning eligibility of parole is unconstitutionally vague. Petitioner seeks leave to proceed in forma pauperis.

Leave to proceed in forma pauperis will be granted unless it appears that the claims made are frivolous or malicious. 28 U.S.C. § 1915 (1976). Because this petition is filed pro se, the allegations presented will be liberally construed under the guidelines of *Haines* v. *Kerner,* 404 U.S. 519 (1972).

Petitioner asserts that Mo. Rev. Stat. § 549.261 (1978), which is titled "Parole from state penal institutions, pris-

oners eligible, when—interview by board—rules," is "unconstitutionally vague and imprecise." This statute provides as follows:

> 1. When in its opinion there is reasonable probability that the prisoner can be released without detriment to the community or to himself, the board shall release or parole any person confined in any correctional institution administered by state authorities. All paroles shall issue upon order of the board, duly adopted.
>
> 2. Any person who has been committed to a penal or correctional institution under the administration of the division of corrections, who has served either one-third of his time or twelve months of the time for which he was sentenced, whichever is a shorter period, in an orderly and peaceable manner without having any infraction of the rules or laws of the institution recorded against him shall be eligible to make application for parole and shall be given a hearing. Any person who has served two-thirds of his time or two years of the time for which he was sentenced, whichever is the shorter period, shall be eligible to make application for parole and shall be given a hearing. Paroles may be granted, however, before the minimum period specified has been served.
>
> 3. Before ordering the parole of any prisoner, the board shall have the prisoner appear before it and shall interview him. A parole shall be ordered only for the best interest of society, not as an award of clemency; it shall not be considered a reduction of sentence or a pardon. A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen. Every prisoner while on parole shall remain in the legal custody of

the institution from which he was released but shall be subject to the orders of the board.

4. The board may adopt such other rules not inconsistent with law as it may deem proper or necessary, with respect to the eligibility of prisoners for parole, the conduct of parole hearings or conditions to be imposed upon parolees. Whenever an order for parole is issued it shall recite the conditions thereof.

To promote comity between federal and state courts, a state prisoner seeking federal habeas corpus relief usually must exhaust state remedies before presenting his claims in federal court. *Pitchess* v. *Davis*, 421 U.S. 482 (1975); *Picard* v. *Connor*, 404 U.S. 270 (1972); *Tyler* v. *Swenson*, 527 F.2d 877 (8th Cir. 1976); *Green* v. *Wyrick*, 414 F. Supp. 343 (W.D. Mo. 1976). This comity is not promoted when it is clear that the petitioner has not stated a claim which would be the basis for relief on a petition for writ of habeas corpus to this Court. Because this Court feels petitioner's claim is controlled by a recent decision by the United States Supreme Court, petitioner will not be required to exhaust available state remedies in this case.

The void for vagueness challenge is based upon the due process clause of the fourteenth amendment, which requires an enactment by a state legislature to clearly define prohibited conduct. *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972). A statute is unconstitutionally vague if it does not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned*, *supra*, at 108. The void for vagueness challenge is generally used against statutes that may result in criminal penalties or that may infringe upon the exercise of first amendment freedoms. *E.g.*, *Hynes* v. *Mayor of Oradell*, 425 U.S. 610 (1976); *Grayned* v. *City of*

Rockford, 408 U.S. 104 (1972); *Angelico* v. *Louisiana*, 593 F.2d 585 (5th Cir. 1979). For the void for vagueness argument to be applicable to petitioner's challenge, his claim must involve an interest protected by the due process clause of the fourteenth amendment.

The fourteenth amendment prohibits the states from depriving a person of life, liberty, or property without due process of law. Plaintiff does not claim that any life or property interest is involved in this action. Thus, for the due process requirements to be applicable in this case, some liberty interest must be at stake. This liberty interest must involve more than some abstract need or desire; plaintiff must have "a legitimate claim of entitlement to it." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972).

The United States Supreme Court recently found that parole release decisions do not involve a liberty interest invoking due process protections under the fourteenth amendment. *Greenholtz* v. *Inmates of Nebraska Penal Correctional Complex*, 442 U.S. 1 (1979). The *Greenholtz* Court held that a State prisoner has no "legitimate claim of entitlement" to release on parole. *Greenholtz, supra*, at 7. A convicted person has no constitutional or inherent right to be conditionally released before the expiration of a valid sentence. The Court pointed out that although a state may create a system of parole, it has no duty to do so. *Greenholtz, supra*, at 7.

The Court in *Greenholtz* distinguished between parole release and parole revocation decisions. In *Morrissey* v. *Brewer*, 408 U.S. 471, 482 (1972), the Supreme Court held that revocation of parole involves a liberty interest protected by the fourteenth amendment. In reaching that conclusion the Court noted that "the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts 'grievous

loss' on the parolee and often on others." *Morrissey, supra,* at 482. Relying on *Morrissey,* the inmate petitioners in *Greenholtz* argued that parole release decisions should be given the same constitutional protection afforded parolees in parole revocation decisions. *Greenholtz, supra,* at 9. The *Greenholtz* Court rejected the *Morrissey* argument with the following distinction between deprivation of a liberty one possesses, such as parole, and denial of a conditional liberty one seeks to obtain, such as release on parole:

> The parolees in *Morrissey* . . . were at liberty and as such could "be gainfully employed and [were] free to be with family and friends and to form the other enduring attachments of normal life." 408 U.S. at 482, 92 S. Ct. at 2600. The inmates here, on the other hand, are confined and thus subjected to all the necessary restraints that inhere in a prison. *Greenholtz, supra,* at 9.

The Court also distinguished the nature of the decision made in parole release as opposed to parole termination. The decision to revoke parole requires a finding that the parolee violated one or more conditions of his parole and that he should be recommitted for the violation or for society's benefit. The parole release decision, on the other hand, involves factual elements as well as subjective appraisal by Board members "based upon their experience with the difficult and sensitive tasks of evaluating the advisability of parole release." *Greenholtz, supra,* at 9-10.

A valid conviction allows a state to confine a prisoner under the rules of its prison system if the conditions of confinement do not violate the Constitution. *Meachum* v. *Fano,* 427 U.S. 215, 224 (1976). As the Supreme Court noted in *Greenholtz,* a state has no obligation to provide a system of parole. By creating a possibility of parole, the

state provides "no more than a mere hope that the benefit will be obtained." *Greenholtz, supra,* at 11, *citing Board of Regents* v. *Roth,* 404 U.S. 564, 577 (1972). Because parole is not a protected right to which petitioner has a legitimate claim of entitlement, petitioner's claim does not invoke due process protection.

Discussing the creation of a system of parole, the *Greenholtz* Court noted that "to insure that the state-created parole system serves the public interest purposes of rehabilitation and deterrence, the state may be specific or general in defining the conditions for release and the factors that should be considered by the parole authority." *Greenholtz, supra,* at 7-8 (footnote omitted). Paragraph 4 of Mo. Rev. Stat. § 549.261 permits the Board of Probation and Parole to develop rules that it feels are proper and necessary to assist in the execution of this statute. From this paragraph it appears that the Missouri legislature intended the statute to set out the broad general goal of providing a system of parole, while delegating to the specialized Board the power to develop the rules governing its implementation. Thus, this type of statute appears to have been within the contemplation of the Court in *Greenholtz.* Petitioner does not argue that rules have not been adopted to clarify the statute or that rules which have been adopted do not clarify insufficiencies in the statute.

In addition the Court in *Greenholtz* emphasized that wide latitude should be given state parole authorities in fashioning standards and procedures to determine parole eligibility, as shown by the following passage:

> No ideal, error-free way to make parole release decisions has been developed; the whole question has been and will continue to be the subject of experimentation involving analysis of practical experience of the actual parole decisionmakers in predicting future be-

havior. Our system of federalism encourages this state experimentation. If parole determinations are encumbered by procedures that states regard as burdensome and unwarranted, they may abandon or curtail parole. *Greenholtz, supra,* at 13.

The deference to be afforded to state experimentation in this area is directly applicable to plaintiff's claim in this action. This deference necessarily countervails a strict application of the vagueness doctrine to the state parole statute which plaintiff now challenges. *See, e.g., Meyers* v. *Alldredge,* 492 F.2d 296, 310-11 (3rd Cir. 1974), and *White Eagle* v. *Storie,* 456 F. Supp. 302, 309-10 (D. Neb. 1978). Also the statute's delegation of authority to the more specialized Board emphasizes the experimental nature of parole and highlights the need of this Court to defer to this state experiment.

Petitioner directs this Court's attention to a decision by the United States District Court for the Southern District of New York that found the New York statute setting forth the grounds for granting parole release to be unconstitutionally vague. *Cicero* v. *Olgiati,* 410 F. Supp. 1080 (S.D.N.Y. 1976). Based upon the reasoning of *Morrissey* v. *Brewer, supra,* the *Cicero* court found that parole decisions involved a "conditional liberty" entitled to due process protections. *Cicero* v. *Olgiati, supra,* at 109[illegible]*iting United States ex rel. Johnson* v. *Chairman, New York State Board of Parole,* 500 F.2d 925 (2nd Cir. 1974), *vacated and remanded as moot sub. nom., Regan* v. *Jackson,* 419 U.S. 105 (1974). This case was decided prior to the holding in *Greenholtz* that parole release decisions do not involve a liberty interest invoking due process protections. In a recent opinion the *Cicero* court noted that in light of *Greenholtz,* "there is a substantial question as to whether the complaint [in *Cicero*] can now be considered to state a

valid claim." *Cicero* v. *Olgiati,* 473 F. Supp. 653, 655 (S.D.N.Y. 1979). Therefore, this Court finds the reasoning of the *Cicero* opinion to be of little value in examining petitioner's claims.

Assuming that petitioner's claim does involve an interest protected by the due process clause of the fourteenth amendment, this Court questions whether this civil statute would be subject to petitioner's challenge that it is vague and imprecise. The statute does not impose criminal penalties or infringe upon the exercise of first amendment freedoms. Therefore, the application of the void for vagueness challenge is doubtful.

Following *Greenholtz,* petitioner's claim that section 549.261 of the Missouri statutes is "unconstitutionally vague and imprecise" does not involve the denial of a federally protected right. Thus, petitioner has not stated a claim entitling him to habeas corpus relief. Because petitioner has not stated a claim involving a federally protected right, this petition for writ of habeas corpus will be dismissed.

For the reasons set forth above it is

ORDERED (1) that leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 should be and hereby is granted. It is further

ORDERED (2) that this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 should be and hereby is dismissed.

Scott O. Wright
United States District Judge

Kansas City, Missouri

Date: June 10, 1980

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

BOBBY LEE GRIFFIN, *Plaintiff,* v. CAROLYN ATKINS, et al., *Defendants.*	No. 79 4243 CV C

FINAL JUDGMENT DISMISSING CAUSE

Pursuant to the governing law and in accordance with the Temporary Special Order of the Court *en banc* entered December 22, 1976, the above-styled cause was referred to the United States magistrate for the hearing and determining of all pretrial and prehearing matters under Section 636(b)(1)(A), Title 28, United States Code, and the making of proposed findings of fact and recommendations with respect to the disposition of actions and the taking of other actions under Section 636(b)(1)(B) of the same title, and also under Local Rule 26 of the Western District of Missouri.

After a determination of the issues herein, the United States magistrate has submitted to the undersigned a report and recommendation that this cause be dismissed.

Plaintiff has had a full and fair opportunity to challenge the magistrate's recommended findings of fact, conclusions of law, and proposed action. And, plaintiff has

failed to state or show any facts or legal principles which create a genuine issue of material fact or warrant correction of the legal principles applied by the magistrate.

Therefore, after a full review of the report and recommendation of the magistrate, and an independent examination of the records and files in the cause, it is concluded that the findings of fact, conclusions of law, and proposed action of the magistrate are correct and should be approved.

Accordingly, for the reasons stated above, the above-styled cause is hereby dismissed.

SCOTT O. WRIGHT
UNITED STATES DISTRICT JUDGE

Dated this 1 day
of May, 1980,
at Kansas City, Mo.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

BOBBY LEE GRIFFIN, *Plaintiff,* v. CAROLYN ATKINS, et al., *Defendants.*	**No. 79 4243 CV-C**

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE THAT THE CAUSE BE DISMISSED AS "FRIVOLOUS" UNDER 28 U.S.C. § 1915(d)

On December 7, 1979, plaintiff, a convicted state prisoner who is currently serving his state sentence at the Missouri State Penitentiary at Jefferson City, Missouri, provisionally filed in forma pauperis a complaint under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and its corresponding jurisdictional statute, 28 U.S.C. § 1983, seeking equitable and declaratory relief and damages for a claimed violation of his federally-protected rights by members of the Missouri Board of Probation and Parole. Named as parties defendant are the Chairperson of the Board, Carolyn Atkins, and two of its members, W.R. Vermillion and Dick D. Moore. Following the provisional filing of

this cause in forma pauperis,* it was referred to the undersigned United States magistrate for processing in accordance with the provisions of 28 U.S.C. § 636, as amended by Public Law 96-82, October 10, 1979; the Special Order of the Court *en banc* of December 22, 1976, providing for the reference of such actions; and Local Rule 26 of the United States District Court for the Western District of Missouri.

In his complaint, plaintiff alleges that he has been an inmate of the Missouri State Penitentiary for more than twenty years in the service of a sentence imposed by the Circuit Court of Cole County, Missouri. Apparently he recently applied for his release upon parole, but his application was denied by the Board. As grounds for relief in this proceeding, it is plaintiff's claim that his constitutionally-protected right to due process of law was denied during the course of the parole eligibility proceedings because "only a single member of the Missouri Board of Probation and Parole attended plaintiff's latest parole hearing." This failure, he asserts, violates the provisions of Section 549.261, V.A.M.S., in that he was not afforded a hearing before the entire board with all three duly-appointed members in attendance. Plaintiff contends that "one member does not have authority to grant plaintiff a

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*It is the practice of this Court to file provisionally those actions in which leave to proceed in forma pauperis has been requested, and then to proceed to a determination of whether or not the applicant is eligible to proceed unconditionally in forma pauperis under 28 U.S.C. § 1915. A determination of "frivolity" may then be made at any later stage of the record, it may be determined that an action is "frivolous" even though leave to proceed in forma pauperis was initially granted. See, Section 1915(d), *supra*. This procedure has been approved by the United States Court of Appeals for the Eighth Circuit on numerous occasions. See, Forester v. California Adult Authority, 510 F.2d 58, 60 (8th Cir. 1975). See also, In re: Willis Smith, 600 F.2d 714 (8th Cir. 1979).

parole if he so desired" and that, therefore, a "hearing" within the meaning of Section 549.261 V.A.M.S., was never held as required by Missouri law. He alleges that the failure to conduct a hearing in the presence of all board members is a violation of the process of law. By way of relief, he sought (1) an injunction to prohibit the Board "from conducting . . . hearings with less than three members present," (2) a writ of mandamus "directing the [Board] to give plaintiff an immediate parole hearing with all three (3) members in attendance," (3) an injunction ordering defendants "to release plaintiff on parole," (4) a declaratory judgment declaring unconstitutional any hearings which are conducted with less than three members of the Board present, and (5) compensatory and punitive damages. However, he has since requested that his request for immediate release on parole, and his demand for an immediate hearing be withdrawn.

Because plaintiff has sought unconditional leave to proceed in forma pauperis, and in order to further clarify the issues herein, the undersigned United States magistrate, by Order of December 14, 1980, directed defendants to show cause why leave to proceed in forma pauperis should not be granted. On January 3, 1980, defendants filed their response to that Order.

In their response to the Order to Show Cause, defendants assert, *inter alia,* that plaintiff is presently foreclosed from litigating his present claim by the bar of *res judicata.* They contend that the general procedures of the Missouri Board of Probation and Parole were challenged in the cause styled, *Williams* v. *Missouri Board of Probation and Parole,* 444 F.Supp. 473 (W.D. Mo. 1978), reversed 585 F.2d 922 (8th Cir. 1978), judgment vacated ____ U.S. ____ (1979), and that plaintiff, as a member of the class described therein, cannot now relitigate the issue. See, Brown

v. Vermillion, 593 F.2d 321, 322 (8th Cir. 1979), and Smallwood v. Missouri Board of Probation and Parole, 587 F.2d 359 (8th Cir. 1978). Moreover, defendants argue that plaintiff "would have little chance of success on the merits" because of the recent holding of the Supreme Court in *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, ___ U.S. ___ 99 S.Ct. 2100, ___ L.Ed.2d ___ (1979), that the "possibility of parole provides no more than a mere hope that the benefit will be obtained, . . . a hope which is not protected by due process." 99 S.Ct. at 2105. And finally, defendants urge that the Missouri statute itself, Section 549.261, does not mandate an initial parole eligibility hearing before the entire Board, but instead specifically permits the Board "to adopt rules it deems proper and necessary with respect to the conduct of parole hearings." The initial parole eligibility hearing, defendants contend, is "a screening device to select the most eligible inmates for parole" and that "before paroling the inmate, the Board can decide by majority vote whether or not to parole the inmates."

Plaintiff, in his traverse, asserts that the issue raised herein was not raised in *Williams* and is, therefore, not *res judicata*. Moreover, he urges that the provisions of Section 549.261, V.A.M.S., are "open to judicial interpretation" and that a requirement that all hearings be conducted by the entire Board is one possible interpretation. He contends that the rules and regulations adopted by the Board can only be properly implemented by hearings with all three board members present.

Because it appeared that plaintiff had not exhausted his adequate and available state court remedies, and in light of the unresolved questions of state law presented by his claims herein, the undersigned United States magistrate, by Report and Recommendation of March 5, 1980,

recommended that the cause be dismissed in favor of plaintiff's state court remedies. However, by "Motion for Reconsideration" filed March 17, 1980, planitiff now alleges that he had attempted to utilize his state court habeas corpus remedy, but that the Circuit Court of Cole County, and the Supreme Court of Missouri, have summarily dismissed plaintiff's petitions. Therefore, it now appears that deference to plaintiff's state court remedies would be inappropriate in light of that action.

It will be recommended that plaintiff's claims be dismissed as "frivolous" under the provisions of 28 U.S.C. § 1915. Under the provisions of that statutory section, the Court is authorized in its discretion to dismiss an action which appears "frivolous or malicious." In re Willis Donald Smith, 600 F.2d 714 (8th Cir. 1979), and Forester v. California Adult Authority, 510 F.2d 58, 60 (8th Cir. 1975). An action is "frivolous" within the meaning of Section 1915(d) if plaintiff's "realistic chances" for ultimate success in the proposed action are "slight." Jones v. Bales, 58 F.R.D. 451, 463 (N.D. Ga. 1972), aff'd 480 F.2d 805 (5th Cir. 1973). See also: Covington v. Cole, 528 F.2d 1365, 1372-73 (5th Cir. 1976); Jones v. Ault, 67 F.R.D. 124, 127 (S.D. Ga. 1973), aff'd 516 F.2d 898 (5th Cir. 1975); Harvey v. Clay County Sheriff's Department, 473 F.Supp. 741 (W.D. Mo. 1979); Boston v. Stanton, 450 F.Supp. 1049 (W.D. Mo. 1978); State of Louisiana ex rel Purkey v. Ciolino, 393 F.Supp. 1166, 1178 (N.D. Ga. 1975). "A determination as to frivolity is a legal determination as to whether there 'exists substantiality as to [the plaintiff's claim] of justiciable basis and of impressing reality.'" Serna v. O'Donnell, 70 F.R.D. 618 (W.D. Mo. 1976), quoting Carey v. Settle, 351 F.2d 483 (8th Cir. 1965). And, here, for the reasons which follow, plaintiff's claims may be deemed "frivolous" under the standards of Section 1915(d), *supra*.

First, it is clear that plaintiff does not state a presently cognizable claim for damages against the members of the Board. Although our Court of Appeals has not yet decided whether or not members of state parole boards have quasijudicial immunity which would absolutely shield them from liability for acts performed within their statutory authority, it has determined that "parole examiners in the exercise of their official duties" are protected by "the good faith immunity from monetary liability outlined in *Wood* v. *Strickland*, 420 U.S. 308, 316-22, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975)." DeShields v. United States Parole Commission, 593 F.2d 354, 356 (8th Cir. 1979). Here, like *DeShields*, plaintiff "has failed to allege ill will, malice discrimination, or other improper reasons for the actions of the parole examiners." *Id.* Moreover, under the facts alleged by plaintiff, defendants are, as a matter of law, entitled to good faith immunity from damages. His claim of violation of due process is, at best, tied to an interpretation of state law which would create a reasonable expectation that his parole application must be heard by the Board sitting *en banc*. For, even under the most liberal approach, plaintiff has no right to a hearing by the full Board unless that right is created by Missouri law. Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, ____ U.S. ____, 99 S.Ct. 2100, ____ L.Ed.2d ____ (1979), and Kelsey v. State of Minnesota, *supra*. But he concedes that Missouri law in this respect is "open to judicial interpretation." Thus, "[b]ecause [defendants] could not reasonably have been expected to be aware of a constitutional right that ha[s] not yet been declared, [defendants] did not act with such disregard for the established law that their conduct 'cannot be reasonably be characterized as being in good faith.' " Procunier v. Navarette, 434 U.S. 555, 565 (1978). Accordingly, for these reasons, plaintiff's claim for damages should be dismissed

as "frivolous" under the provisions of 28 U.S.C. § 1915(d) in that it is presently not cognizable under the Civil Rights Act, or, for that matter, under any other federal constitutional or statutory provisions.

There remain plaintiff's claims for equitable and declaratory relief to compel the Board to sit *en banc* when parole eligibility hearings are conducted and to declare unconstitutional the current practice of the Board to hear initial parole applications in the presence of one Board member, a parole officer, and a representative of the correctional institution, rather than before the entire three-member board. These claims are not valid if grounded solely upon the Due Process Clause of the Fourteenth Amendment. For, under *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex, supra* at 2106 (1979), the possibility of release on parole is not, in and of itself, an interest entitled to due process protections. In *Greenholtz,* the Supreme Court expressly recognized the distinction between a liberty interest currently enjoyed, but subject to termination, and an interest that only can be enjoyed in the future following favorable action by an administrative board. Hence, the constitution automatically mandates the application of due process procedures to parole revocation proceedings, Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), but not to parole application proceedings. Accordingly, plaintiff can succeed in these proceedings only if the language of the Missouri parole statute itself creates a "protectible expectation of parole." Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, *supra* at 2106.

But unlike the language of the Nebraska statute, a statute which the Supreme Court characterized as having "unique structure and language," 99 S.Ct. 2106, the Missouri statute does not create protectible expectations to

release on parole. As recently indicated in *Boothe* v. *Hammock*, 605 F.2d 661, 663 (2d Cir. 1979), "[t]he only characteristic of the Nebraska statute that the Court mentioned as relevant to [the conclusion that protectible expectations were created by the Nebraska statute] was the requirement that release 'shall' be ordered 'unless' one of four disqualifying conditions is found to exist." That language, in effect, was held to create a situation analogous to a condition subsequent as found in property and contract law; the entitlement to parole vested unless conditions existed to defeat that entitlement. Here, however, the Missouri statute creates an entitlement to parole only if the Board finds "in its opinion there is reasonable probability that the prisoner can be released without detriment to the community or to himself," the equivalent to a condition precedent. While this analysis may be somewhat semantically artificial, it is decisive. "One cannot fairly read the majority's opinion in Greenholtz without concluding that the majority thought there was not only a difference, but a difference on which entitlement to due process safeguards depends." Boothe v. Hammock, *supra*, at 664. On this basis it has been held that the statutes of other states do not create an expectation of parole release sufficient to trigger due process procedural protections. See, Boothe v. Hammock, *supra* (New York statute); Smith v. Shoemaker, ____ F.2d ____ (6th Cir. 1980) (Ohio statute); Wagner v. Gilligan, 609 F.2d 866 (6th Cir. 1979) (Ohio statute); Shirley v. Chestnut, 603 F.2d 805 (10th Cir. 1979) (Oklahoma statute); Austin v. Armstrong, 473 F.Supp. 1114 (D. Nev. 1979) (Nevada statute); Parisie v. Irving, ____ F.Supp. ____ (N.D. Ill., No. 80 C 131, 1980) (Illinois statute); and Campbell v. Montana State Board of Pardons, 470 F.Supp. 1301 (D. Mont. 1979) (Montana statute).

Moreover, even assuming *arguendo* that plaintiff has "a protectible expectation of parole" created by the Mis-

souri statute, his claim herein is without merit. Neither the constitution nor the provisions of Section 549.261, V.A.M.S., expressly mandate a hearing in the presence of all members of the board. Section 549.261, subsection (2), V.A.M.S., provides, *inter alia,* that a parole applicant who has served a specified portion of his sentence "shall be given a hearing." Subsection (3) of the same statutory section provides that, "[b]efore ordering the parole of any prisoner, the board shall have the prisoner appear before it and shall interview him." And finally, subsection (4) of Section 549.261, V.A.M.S., provides that, "[t]he board may adopt such other rules not inconsistent with law as it may deem proper or necessary, with respect to . . . the conduct of parole hearings." Plaintiff argues that these provisions entitle him to a hearing before the entire board because subsection (3) of Section 549.261 requires that the applicant "appear before it" for an interview. Additionally, he urges that the regulations of the board, as set forth in the Rules and Regulations Governing the Granting of Parole and Related Procedures, can only be accomplished by a hearing before the entire board, sitting as a three-member panel. Defendants, on the other hand, point to the provisions of subsection (4) of Section 549.261, V.A.M.S., which expressly provides that the board may adopt rules concerning the conduct of parole hearings, and they also rely upon the provisions of subsection (2) which require only "a hearing." They indicate that an *initial* hearing, designed as a "screening device," is conducted by one member of the board. Then, if the applicant appears parole eligible, he appears before the entire board. This system, defendants argue, is permissible under the rule-making power conferred by subsection (4), *supra.*

A reading of the provisions of Section 549.261, V.A.M.S., supports defendants' contention in this regard. That statute requires, at least on a threshold basis, only

that "a hearing" be held. There appears to be no limitation within the statute upon the power of the board to delegate hearing responsibility among its members, or, for that matter, to hearing examiners employed by the board. To the contrary, subsection (4) of Section 549.261, V.A.M.S., explicitly authorizes the board to "adopt such . . . rules not inconsistent with law as it may deem proper or necessary, with respect to the . . . conduct of parole hearings . . . ." Thus, the procedure employed by the board, as described by defendants in their response to the Order to Show Cause, does not offend the Missouri statutory provisions. Accordingly, because a hearing before the entire board is not mandated by Missouri law, and cannot be found in the mandate of *Greenholtz*, plaintiff states no denial of any federally-protected, or a state-created right.

For the reasons stated above, and pursuant to the provisions of 28 U.S.C. § 636, it is therefore

RECOMMENDED that the above-styled cause be dismissed as "frivolous" under the provisions of 28 U.S.C. § 1915(d).

Under 28 U.S.C. § 636(b)(1)(C) plaintiff may make specific written exceptions to any or all of the foregoing recommendations within 10 days of his receipt thereof.

Richard H. Ralston
UNITED STATES MAGISTRATE

Dated this 16th day
of April, 1980, at
Kansas City, Mo.

Opposition

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No. 81-1133

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MISSOURI BOARD OF PROBATION AND PAROLE,
DICK MOORE, Chairman,
CAROLYN V. ATKINS,
and
BILL DUNCAN,
Members of the Board,

Petitioners,

v.

JAMES E. WILLIAMS
and
JUNIOR THEOBALD,
Individually and on Behalf of All Other
Persons Similarly Situated,

Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Attorneys for Respondents

I.

QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment applies to parole release determinations made by the Missouri State Board of Probation and Parole under the provisions of Section 549.261 of the Revised Statutes of Missouri which provides that the Board "shall" parole a prisoner when the Board is of the opinion that he can be released without detriment to the community or himself.

2. Whether the Due Process Clause of the Fourteenth Amendment, if found applicable to Missouri parole release decisions, requires that the prisoner being considered for parole be allowed access to his parole file.

3. Whether, in regard to ruling on the above issues, the lower courts should have abstained.

II.

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No. 81-1133

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

MISSOURI BOARD OF PROBATION AND PAROLE,
DICK MOORE, Chairman,
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Members of the Board,

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v.

JAMES E. WILLIAMS
and
JUNIOR THEOBALD,
Individually and on Behalf of All Other
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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

Since the filing of the Petition for Writ of Certiorari, the opinion of the United States Court of Appeals for the Eighth Circuit has been reported at 661 F.2d 697 (8th Cir. 1981).

GROUNDS OF JURISDICTION

Respondents do not question the grounds of jurisdiction set forth in the Petition.

STATUTORY PROVISIONS

18 U.S.C. §4208(c) and (d):

> (b) At least thirty days prior to any parole determination proceeding, the prisoner shall be provided with (1) written notice of the time and place of the proceeding, and (2) reasonable access to a report or other document to be used by the Commission in making its determination. A prisoner may waive such notice, except that if notice is not waived the proceeding shall be held during the next regularly scheduled proceedings by the Commission at the institution in which the prisoner is confined.

(c) Subparagraph (2) of subsection (b) shall not apply to--

(1) diagnostic opinions which, if made known to the eligible prisoner, could lead to a serious disruption of his institutional program;

(2) any document which reveals sources of information obtained upon a promise of confidentiality; or

(3) any other information which, if disclosed, might result in harm, physical or otherwise, to any person.

If any document is deemed by either the Commission, the Bureau of Prisons, or any other agency to fall within the exclusionary provisions of subparagraphs (1),(2), or (3) of this subsection, then it shall become the duty of the Commission, the Bureau, or such other agency, as the case may be, to summarize the basic contents of the material withheld, bearing in mind the need for confidentiality or the impact on the inmate, or both, and furnish such summary to the inmate.

Section 549.285, RSMo 1978:

"The presentence report, the preparole report and the supervision history, obtained in the discharge of official duties by any member or employee of the board, shall be privileged and shall not be disclosed directly or indirectly to anyone other than the board, the judge of the court having jurisdiction over the defendant, or others entitled under sections 549.205 to 549.291 to receive such information, except that the board or court may at their discretion permit the inspection of the report of parts thereof by the defendant or prisoner or his attorney, or other person having a proper interest therein, whenever the best interest or welfare of a defendant or prisoner makes the action desirable or helpful."

13 Code of State Regulations, section 80-2.010:

Set forth in Appendix

STATEMENT OF THE CASE

The statement of facts contained in the Petition for a Writ of Certiorari is substantially correct. It should, however, additionally be noted that ordinarily a complete reading of the parole file is deemed unnecessary by members of the Board hearing panel, and the panel generally relies upon the institutional parole officer's report for the facts upon which its decision will be based. The institutional parole officer's sources of information for the pre-parole report will include, but not necessarily be limited to, the contents of the parole file, discussion about the inmate with guards, job supervisors, teachers, and members of the Division of Adult Institutions' staff. Views of the Division of Adult Institutions' staff will sometimes be included in the report. Institutional parole officers do not have the time nor the resources to make independent investigations to verify the information they receive from sources inside and outside the institution. Generally, two of the individuals comprising the hearing panel will have possession only of the pre-sentence report, the classification report, and the institutional parole officer's report and will not examine the rest of the parole file.

As a matter of Board policy, inmates are not allowed to examine the materials contained in the parole file or in the institutional parole officer's report, nor are inmates' counsel allowed such access. There is no other form or procedure by which an inmate can determine the existence of adverse allegations or factual statements in his parole file.

An inmate is not allowed to be present when any testimony is taken before the Board at a parole hearing and, should a witness testify against the inmate at the hearing, as a matter of Board policy, the inmate is not allowed to be present.

The reasons given to inmates indicating the basis for the denial or delay of parole are submitted on a printed form indicating 13 reasons, the most common reasons given for denial or delay of parole, which may be checked. In more than 50 percent

of the cases, the only reasons given to the inmate for denial or delay of parole are those already printed on the form.

In making parole release decisions, the Board follows its own regulation, which specifically delineates factual matters which the Board will examine. The regulation is codified in the Code of State Regulation at 80 CSR 80-2.010 and is reproduced in the Appendix.

SUMMARY OF ARGUMENT

Grounds for the granting of the petition in this case are not present as the Court of Appeals correctly applied the principles set forth in this Court's opinion in Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979), in that the Missouri parole granting statute is mandatory in nature, providing that the Parole Board "shall" grant parole when the statutory criteria are met and is thus indistinguishable from the Nebraska statute examined in Greenholtz.

Since the Greenholtz decision, no Circuit Court of Appeals has construed a parole statute containing mandatory language such as those of Missouri and Nebraska. Those cases which have been decided involved statutes granting absolute discretion to the paroling authority and thus, under Greenholtz, the due process clause was found inapplicable. Because of the difference among the statutes and the significance of that difference, the decisions are completely consistent and no conflict exists.

The Court of Appeals properly declined to abstain as this Court's Greenholtz decision indicates that the issue is a proper one for the federal courts to hear. Further, no state statute is challenged here; state law specifically permits the Board of Probation and Parole to disclose the contents of parole files to inmates. Access to the files is denied only under a policy of the Board. The relief sought by plaintiffs below would not require supervision of the parole process by the district court. Respondents have no adequate state remedy.

ARGUMENT

I.

The threshold substantive issue in this action is whether the Missouri statue governing parole of prison inmates, §549.261, RSMo 1978, like the Nebraska statute construed by this Court in Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979), creates an "expectancy of release . . . entitled to some measure of constitutional protection." Id. at 12. Respondents submit that because the Missouri act is cast in mandatory terms, providing the Board of Probation and Parole "shall" order the release on parole of a prison inmate "when in its opinion there is reasonable probability that the prisoner can be released without detriment to the community or himself...," it is constitutionally identical to the Nebraska scheme. If this is true, then there is no conflict in the Court of Appeals parole decisions rendered since Greenholtz.

In Greenholtz, this Court stated that the existence of a discretionary parole system created by state law in which the state holds out the mere possibility of parole provides only a "hope" for release and does not implicate an interest in liberty protected by due process. The Court held, however, that because the Nebraska statutory scheme for parole was cast in mandatory terms, the interest of the inmates in parole was more than "ephemeral" and was thus deserving of constitutional protection.

That decision was consistent with a line of cases concerning the rights of convicted felons. Beginning with Morrissey v. Brewer, 408 U.S. 471 (1972), this Court has made clear how the extent to which inmates maintain some liberty constitutionally protected against arbitrary state action is to be determined. The touchstone of the required analysis is the inmates' "expectancy" of a particular event. The degree to which an inmate can justify an expectation of a particular event -- be it granting or revocation of parole, early release, work release, residence in a particular institution, housing in general population, or

whatever -- determines whether that expectation is an interest in liberty subject to due process protection. If a state gives its executive branch absolute and unfettered discretion regarding those who violate its criminal laws, then the transgressors have no right to expect anything. If, on the other hand, that discretion is limited, and areas of entitlement free of discretion are defined by statute, regulation, or practice, then there is a right, in the constitutional sense, to procedurally fair treatment within those areas.

In Morrisey v. Brewer, supra, while recognizing that a parolee enjoyed only a "conditional liberty," the Court rejected the notion that revocation of parole was "so totally a discretionary matter that some form" of due process hearing was not required. Although a decision to revoke parole was within the state's discretion, the discretionary aspect is not reached, "unless there is first an appropriate determination that the individual has in fact breached the conditions of parole." Id. at 483-84.

Similarly, in Wolff v. McDonnell, 418 U.S. 539 (1974), prison inmates who did not enjoy current freedom were held to have a constitutionally protected interest in the retention of statutorily created good-time credits. Time earned under the statute could not be withheld at the discretion of prison officials because the statute provided such action could be taken only when the inmate was guilty of serious misconduct. Such a determination is thus "critical" and due process procedures are required.

Because a Massachusetts statute gave prison officials absolute discretion to transfer inmates from one facility to another, the Court held there was no constitutional right to a due process hearing prior to transfer in Meachum v. Fano, 427 U.S. 215 (1976). The discretion vested by the statute was total, hence the inmates could not legitimately expect -- nor consider it a right-- to remain in any one institution. The Court made it clear that absent some basis for expecting not to be transferred, there was no legitimate interest to protect.

The same type of "full discretion" was found in the statutory power of the United States Board of Parole to determine when to execute warrants and detainers lodged against federal prisoners in Moody v. Daggett, 429 U.S. 78 (1976). Absent any limitation on the discretion of the Board to act whenever it chose to, the inmates had no legitimate expectation that action would be taken immediately.

But when prisoners may be transferred to mental institutions only upon a finding that they suffer from a mental disease or defect, there is an "objective expectation" that there will be no transfer unless one of the specified conditions exists and that expectation is protected by the due process clause. Vitek v. Jones, 445 U.S. 480 (1980). Vitek was like Morrisey and Wolff and distinguishable from Meachum: the Director of Correctional Services did not have absolute discretion to transfer--he could do so only upon a finding of the existence of certain specified conditions and inmates have a legitimate expectation that they will not be transferred absent the existence of such conditions.

In Greenholtz, Nebraska inmates could legitimately expect parole because the statute was mandatory: " . . . the Board of Parole shall order . . . release unless it is of the opinion that . . . release should be deferred . . ." due to one of four abstract reasons. The Nebraska statute was termed "unique" by the Court and it is different from the forty-three states who do give their paroling authorities absolute discretion, usually providing that they "may" grant paroles.

Missouri is one of the small number of states where this executive discretion is limited. Unless the Missouri Board of Probation and Parole believes there is a reasonable probability that release of a prisoner would cause detriment to the community or the prisoner, §549.261 provides that it "shall release on parole any person confined in any correctional institution administered by state authorities." The Board cannot deny parole to one meeting the statutory criteria, thus a legitimate expectation is created.

Statutes providing that a parole "may" be granted confer unfettered discretion upon the parole decisionmakers and no expectation of release can be justified. The Courts of Appeals have uniformly held that such totally permissive language creates no entitlement. All of the appellate decisions listed in Appendix B of the Petition for Writ of Certiorari involve such statutes. The Eighth Circuit decision in this action is the only case where a statute providing only limited discretion has been in issue, so there is no conflict among the circuits on this point. In fact, all but one of the district court decisions listed in the Petition involve absolute discretion. The one exception, Campbell v. Montana State Board of Pardons, 470 F. Supp. 1301 (D.Mont. 1979), was a decision denying a pro se in forma pauperis petition. The court did not analyze the Montana statute, but merely stated: "The language of the Montana statute does not in my opinion create an entitlement." Had the court reached the merits and had it the benefit of argument by counsel for the inmate it may well have held differently, for there is no discernible basis for distinguishing the Montana parole statute from that of Nebraska.

The Courts of Appeals decisions are completely consistent. There is therefore no need to grant certiorari to resolve a conflict on the issue of when a parole statute creates a legitimate expectation of release deserving of due process protection.

II.

Respondents cannot contend that the issue of whether due process requires access to the parole file is not important, but because Greenholtz did make it clear how that issue was to be decided and because the court below applied the test properly, further action by this Court is not necessary.

The Greenholtz opinion reiterated that the three-part analysis described in Mathews v. Eldridge, 424 U.S. 319 (1976), is to be used in determining the extent of the procedural requirements of the due process clause in a particular situation. The three factors to be considered are: the private interest that will be affected by the official action, the risk of an erroneous deprivation of such interest through the procedures used and the

probable value, if any, of additional or substitute procedural safeguards, and the Government's interest in the burdens that additional safeguards would entail. Id. at 335.

Application of the test in the instant situation is guided by the opinions in Greenholtz and Morrisey v. Brewer, supra. Morrisey held and Greenholtz impliedly reaffirmed that the private interest involved in parole is liberty--parole "includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others." Morrisey v. Brewer, 408 U.S. at 482. It could hardly be disputed that the interest held by respondents here is enormous.

Greenholtz focused primarily on the second part of the analysis, examining the degree to which the procedures requested by the inmates minimized the risk of erroneous decisionmaking. It is that part of the test which inescapably leads to the conclusion that due process requires providing inmates with access to their parole files. As Chief Justice Burger noted, there is a risk that parole files will contain wholly inaccurate information. Because the Nebraska inmates did not complain, however, about file access or the possibility of error, it was apparently assumed that the Nebraska Board was exercising its discretion to disclose the contents of the files to the inmates. 442 U.S. at 15, n.7. But in Missouri, it is an ironclad policy of the Board of Probation and Parole not to provide access to the file information.

It is easy to see just how great a risk there is of erroneous parole decisions for, as was noted in Greenholtz, "the decision is one that must be made largely on the basis of the inmate's file." Id. at 15. In Missouri, in fact, many parole decisions are made following a "review" at which the inmate is not present and has no opportunity to communicate with the panel which is to make the decision. Williams v. Missouri Board of Probation and Parole, 661 F.2d 697, n. 3, (8th Cir. 1981). As was stipulated by the parties and found by the Court of Appeals, the parole files contain a great deal of unverified information. It was

also stipulated that this material is considered by the Parole Board. As the Court of Appeals stated, this "inflates the risk of erroneous decisions and could thus flaw the decisionmaking process." Id. at 700.

The Board's regulations detail the issues to be considered at parole hearings and those matters which will be "weighed heavily." See Appendix. Among these are the existence of prior "crime oriented activities," a "history of assaultive behavior," a history of drug or alcohol abuse, institutional infractions, any possible injury to the victim of the inmate's crime, and the "degree of sophistication" shown in the crime. See 13 CSR §80-2.010. That these kinds of issues are factual in nature can hardly be disputed. And that in the Missouri system many if not all these issues are determined from hearsay and unverified information contained in the parole files is equally clear. The high risk of inaccurate decisionmaking is obvious.

Justice Marshall's opinion in Greenholtz points out that "researchers and courts have discovered many substantial inaccuracies in inmate files, and evidence in the instant case revealed similar errors." 442 U.S. at 33 and n. 15. Other courts dealing with the issue of file accuracy have reached the same conclusion. See, e.g., Tasker v. Mohn, 267 S.E.2d 183 (W.Va. 1980); Matter of Sinka, 599 P.2d 1275 (Wash. 1979).

The state has several interests involved. First and foremost, the state shares an interest with the inmate in "the accurate finding of fact and the informed use of discretion." See Gagnon v. Scarpelli, 411 U.S. 778, 785 (1973). It also has an interest in treating potential parolees "with basic fairness." Cf. Morrissey v. Brewer, supra. The state undoubtedly has an interest in whatever administrative burden might be occasioned by providing inmates with access to their files. But petitioners have made no showing that any such burden would be intolerable or that it would somehow hamper the exercise of their discretion. Indeed, the United States has provided federal prisoners with access to their files for

sometime, 18 U.S.C. §4208(b), and there is no evidence that the procedure has been onerous. The court below had the benefit of the record of the trial at which two officials of the Minnesota parole system testified that the burden resulting from that state's decision to permit file access had not been great and had been positive in terms of assuring accurate factual determinations.

The state undoubtedly also has an interest, as the Court of Appeals held, in "preserving the confidentiality of sources of information necessary for parole release decisions and in maintaining security and discipline within its institutions." 661 F.2d at 700. The court remanded the case to the district court for a decision as to how best to deal with these interests. Reconciling this interest with that of the state and the inmates in accurate factfinding will not be difficult. Other states and the federal system provide for withholding sensitive material and giving the inmate merely a summary of confidential information. See, e.g., 18 U.S.C. §4208(c).

Here again, because no Court of Appeals has been confronted with a mandatory parole statute since the Greenholtz decision was handed down, there is no decision other than this one dealing with the issue of file access under such a statute. But the test to be applied is clear and the court below has correctly applied it. Further review by this Court would not, therefore, seem warranted.

III.

In Moore v. Sims, 442 U.S. 415 (1979), this Court required abstention where plaintiffs sought to enjoin a state from initiating juvenile court proceedings in a widespread direct challenge to the constitutionality of the Texas Family Code. Petitioners attempt to bring this case within the scope of Moore by hyperbolically stating that respondents have mounted a "broad-based challenge" to Missouri's parole procedures. (Petition at 23). In fact, the only modification currently requested by respondents is access to inmate parole files. All other issues originally

raised by the complaint have either been withdrawn or mooted by subsequent rule changes promulgated by petitioners. Thus the considerations of federal-state comity implicated by the breadth of the challenge in Moore are simply not present here.

Based on their expansion of the relief sought, petitioners proceed to contend that the relief granted would entail extensive supervision of the Board of Probation and Parole by the district court. Again, the case is overstated. Respondents sought only an order directing promulgation of a regulation providing for reasonable access to the parole files. It must be assumed that if petitioners adopt such a regulation they would follow it. Even if they didn't, state court review would be available. Nowhere is the need for any type of ongoing supervision suggested by respondents and nowhere do petitioners provide a factual justification for such a contention.

This case does not involve a direct challenge to the constitutionality of a state statue. The bar to the relief respondents have sought is only a policy adopted by petitioners. The new policy ordered by the court below is one expressly permitted by Missouri statute. See §549.285, RSMo 1978. Thus the type of federal interference in state legislative policies found in Moore v. Sims; Railroad Commission v. Pullman Co., 312 U.S. 496 (1941); Harris County Commissioners Court v. Moore, 420 U.S. 77 (1975); and Babbitt v. United Farm Workers National Union, 442 U.S. 289 (1979), is simply not present in this action.

Rather, the examination of state law required here is incidental to a determination of the federal constitutional question presented. When Greenholtz was decided, this Court followed the practice used in numerous procedural due process cases in which the determination of the existence of an entitlement created by state law was made as a prelude to determining the applicability of the Fourteenth Amendment. See, e.g., Vitek v. Jones, 445 U.S. 80 (1980); Bishop v. Wood, 426 U.S. 341 (1976); Wolff v. McDonnell, 418 U.S. 539 (1974). Cf. United States v. Durham Lumber Company, 363 U.S. 522 (1960).

Furthermore, respondents have no adequate state remedy at this point. The two named plaintiffs who now represent the certified class in this action have been released on parole. They could not, therefore, maintain an action in the state court system. No other member of the b(2) class has come forward to institute and adequately prosecute an appropriate state action. While Williams and Theobald continue to adequately represent the class here, they could not now do so in Missouri. The rights of the class which they have represented would go unvindicated. The situation is thus similar to that in Vickers v. Trainor, 546 f.2d 739 (7th Cir. 1976), in which the Court of Appeals held that abstention was not appropriate in a federal class action where Illinois state law would not permit maintenance of a class action.

Even if Williams and Theobald were still incarcerated, they could not seek the necessary declaration from the Missouri courts without foregoing their rights to have their claims heard in a federal forum. If all of the issues in this case were submitted to the state courts, including the applicability of the due process clause, then the state court decision would be res judicata and appellants would be barred from presenting their §1983 claims to the district court. England v. Louisiana Medical Examiners, 375 U.S. 411 (1964).

On the other hand, if they reserve their federal questions from state decision, then the question presented in the state court would be only whether, once the Missouri Board has made a finding that detriment would not occur because of release, could it refuse to release an inmate on parole. There is no evidence that that precise fact situation has occurred, hence any action raising the issue would present a hypothetical question--one which the Missouri courts will not entertain. MFA Mutual Insurance Company v. Hill, 320 S.W.2d 559 (Mo. 1959).

Thus the class could secure a state decision, assuming someone agrees to represent it, only by submitting all issues raised here and foregoing its right to a federal forum. This choice may not be forced upon respondents. Tovar v. Billmeyer, 609 F.2d 1291

(9th Cir. 1980).

Finally, though not controlling, the time spent in litigation of this matter should not be overlooked. The action was filed in March 1974, tried in August, 1976, and finally decided by the district court in January, 1978. Since then, a decision rendered by the Court of Appeals in October, 1978, was vacated and remanded by this Court in June, 1979, and the case was sent back to the district court which rendered another judgment in July, 1980, and it has now been decided again by the Court of Appeals and pends here for the second time. Surely the equitable principles underlying the abstention doctrine do not dictate now starting this litigation anew.

CONCLUSION

For the foregoing reasons, respondents request this Court to deny the Petition for A Writ of Certiorari.

Respectfully submitted,

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APPENDIX

13 CSR 80-2.010 Parole Hearings

PURPOSE: Parole hearings, which are personal appearances of an inmate of a state adult correctional institution before the Board of Probation and Parole, are required by section 549.261, RSMo (1978). This rule sets forth the purposes and procedures for such hearings and the various possible results of such a hearing.

(1) Parole hearings are conducted for the following purposes:

(A) To allow the inmate the opportunity to

1. present to the parole board in person his own version of the present offense;

2. to discuss his own problems and needs;

3. to discuss his evaluation of the progress he has made towards his rehabilitation while confined;

4. to present his reasons why he thinks he is ready for parole release consideration;

5. to present his plans for the future;

6. to present and discuss any other matters that are appropriate for consideration for his parole release;

(B) To provide the parole board the opportunity to:

1. review all available reports and case history material pertinent to his case: such as, social history, medical, psychological and psychiatric reports, prior record of arrests and circumstances pertaining thereto, past and present patterns of behavior;

2. review his institutional adjustment, conduct and progress as such reflects upon his attitude and preparation to resume his life in a free society;

3. evaluate him as a person in regard to his readiness for parole release.

(2) Parole hearings are conducted each month at the state penitentiary, intermediate reformatory and the training center for men. Hearings are conducted each month for those confined in the honor centers in Kansas City and St. Louis, and at Renz Farm and Church Farm. Inmates of these institutions are transported to the state penitentiary for hearings.

(3) Scheduling of parole hearings.

(A) An inmate will be eligible for a parole hearing when he has served one (1) year or one-third (1/3) of his sentence, in accordance with the following schedule:

1. Length of Sentence	No. of Months To Be Served
2 years	6 months
3 years	8 months
4 years	10 months
5 years	12 months
6 years	14 months
7 years	16 months
8 years	18 months
9 years	20 months
10 years	22 months
11 years or over	24 months

2. An inmate will receive written notice of the date of his hearing approximately forty-five (45) days prior to his personal appearance before the parole board. Accompanying this notice will be a list of factors the board may consider at the time of the hearing.

3. An inmate may request that his parole hearing be scheduled for a later date. A request for a setback of less than three (3) months will not be accepted by the board.

4. After an inmate receives his notice of parole hearing, if he has further questions he should contact his institutional parole officer. If he does not receive a satisfactory answer, he should direct his question or request in writing to the parole board.

5. Inmates with sentences of six (6) years or more must make a written request to the board if they desire a parole hearing prior to the schedule as set out in 13 CSR 80-2.010(3)(A)1.

(B) An inmate need not make an application for a parole hearing, since he will be automatically scheduled by the parole board in accordance with the schedule in paragraph (3)(A)1. of

this rule. There will be only three (3) exceptions:

1. The first will be when an inmate is serving consecutive sentences. After he is heard on his first sentence, if he wishes to have a parole hearing on subsequent sentences, he will have to make written application for this hearing. Otherwise his case will be reviewed by the board at the expiration of each consecutive sentence as set out in 13 CSR 80-2.020(2)(B). If, however, an inmate closed his case on the first sentence without having a parole hearing, a hearing will be scheduled in the first month of the second sentence.

2. The second will be when an inmate has been convicted of a felony where a dangerous or deadly weapon is used and is guilty under the law of "armed criminal action" his parole hearing will be as follows:

A. First conviction of "armed criminal action" a parole hearing will be held once three (3) calendar years have been served on the sentence.

B. Second conviction of "armed criminal action" a parole hearing will be held once five (5) calendar years have been served on the sentence.

C. Third conviction of "armed criminal action" a parole hearing will be held once ten (10) calendar years have been served on the sentence.

3. When an inmate has been convicted under the capital murder statute (section 565.008) and has been sentenced to life imprisonment, he will be eligible for parole after fifty (50) years have been served on the life sentence.

(C) Jail time as granted by the sentencing judge is deducted from the sentence in the scheduling of the hearing date.

(D) A serious conduct violation prior to the hearing date will not affect the date of the hearing.

(E) If an inmate has not been granted a parole hearing before escaping from custody he will be scheduled for a hearing after he serves 2/3rds of his sentence or two (2) years, whichever is less.

(F) An inmate who has a court action pending will be given a parole hearing at the normally scheduled time.

(G) If an inmate has had a parole hearing and escapes after the hearing, the board will schedule him for a parole review at any time within one (1) year from the month of his return to the division of corrections.

(4) Representative allowed for parole hearings.

(A) An inmate may have a person of his choice at the hearing. The function of this representative shall be to offer a statement at the conclusion of the interview of the inmate and to provide such additional information as the hearing panel shall request.

1. Other inmates may not be present at the hearing.

2. Interested parties who oppose parole may select a representative to appear and offer a statement.

3. The hearing panel shall limit or exclude any irrelevant or repetitious statement.

(B) It is not at all necessary that an inmate have a representative at the hearing.

(5) Although the board considers each case on its individual merits, the following major categories of factors are weighed heavily in the decision-making process:

(A) Seriousness of the offense and the nature and circumstances of the offense to determine if the inmate has served sufficient time for the purposes of retribution and general deterrence --

1. the official version of the offense and the length of the sentence,

2. the inmate's motivation for committing the offense, his role in the offense, the amount of loss and/or injury to the victim, and the degree of sophisticatiion evidenced in the offense,

3. offenses which involved a weapon and/or physical injury or possible injury to the victim,

4. crime-oriented activities such as a series of

crimes, which reflect extensive crime involvement, and

5. the board considers the deterrent and retributive portion of the sentence to have been served when approximately twenty-five percent (25%) of the maximum sentence has been served, or when twelve (12) years of the maximum sentence has been served by inmates with sentences of life or fifty (50) years or more;

(B) Evaluation of the inmate's criminal record, both adult and juvenile --

1. seriousness of the criminal record rating considers such things as probations, suspended sentences, arrests not followed by conviction, and multiple sentences,

2. consideration is given to the length of time between offenses,

3. a history of assaultive behavior, or behavior related to drug or alcohol abuse is considered,

4. recent failure on community supervision, particularly through the commission of a new crime is given consideration, and

5. the board will deny or defer parole to inmates at their first parole eligibility who have a criminal record rating of serious --

A. serious is defined as a record in which the total maximum sentences to incarceration exceeds five (5) years

B. this includes only sentences on which the inmate actually served jail or prison time, and

C. commitment to a training school is considered equivalent to a one (1)-year sentence;

(C) Institutional behavior --

1. number and seriousness of institutional infractions, particularly during the past twelve (12) months, and

2. poor institutional discipline is commission of three (3) or more minor infractions and/or one (1) major infraction during the past twelve (12) months, major infraction may include possession of a weapon, possession of drugs, theft, creating

a disturbance, assault, escape or attempted escape;

(D) Participation in educational, vocational and rehabilitative programs available in the correctional facility --

1. consideration is given to the degree to which the prospective parolee has participated in and responded to institutional programs, although satisfactory performance will not guarantee favorable decision, and

2. Failure to participate will be interpreted as a sign the inmate is unwilling to develop skills to increase the probability of successful adjustment on parole;

(E) Psychological reports, although not routine, are sometimes considered appropriate. An unfavorable psychological or psychiatric report will not cause parole to be denied by itself;

(F) Factors considered when there is neither a poor institutional discipline nor a serious criminal record and/or the deterrent and retributive portion of the sentence has been served --

1. factors related to prior criminal record such as, serious juvenile record, short interval between offenses, history of crimes related to alcohol or drug abuse, history of assaultive behavior, probation violator, or professional drug dealer,

2. factors related to the present offense such as, offense committed while on probation or parole, weapon or excessive force involved, relatively high degree of sophistication shown in the crime, and

3. factors related to the inmate personally such as, no motivation toward self-improvement, crime-oriented lifestyle, alcohol or drug habit serious enough to raise questions about the probability of a successful parole, rebellious, hostile, anti-social attitude, no remorse, does not understand nature of offense, or a history of psychological problems, and

(G) Factors considered and weight attached vary according to the length of the maximum sentence and the amount of time served.

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Brief in Opposition was served upon the Missouri Board of Probation and Parole, Dick Moore, Chairman, Carolyn V. Atkins, and Bill Duncan by depositing said document in a United States Postal Service mailbox, with first-class postage prepaid, addressed to counsel of record for those parties at their post office address:

John Ashcroft,
Attorney General

Paul Robert Otto
Assistant Attorney General

Broadway State Office Building
P.O. Box 899
Jefferson City, Missouri 65102

Michael Thompson
Attorney for Respondents

(6) The procedure which is followed at the time of the parole hearing is:

(A) The inmate will appear along with his representative, if any, in person, before the parole board;

(B) The interview will be mechanically recorded;

(C) The hearing shall not be open to the public, and the records of all such hearings shall be treated as confidential and not be open to inspection by the inmate concerned, his representative or any other unauthorized persons.

RECEIVED
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No. 81-1133

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MISSOURI BOARD OF PROBATION AND PAROLE,
DICK MOORE, Chairman,
CAROLYN V. ATKINS,
and,
BILL DUNCAN,
Members of the Board,
Petitioners,

v.

JAMES E. WILLIAMS
and
JUNIOR THEOBALD,
Individually and on Behalf of All Other
Persons Similarly Situated,
Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondents James E. Williams and Junior Theobald on behalf of themselves and all other persons similarly situated, by their counsel, move the Court for an order permitting them to proceed in forma pauperis under Rule 46 with their opposition to the Petition for A Writ of Certiorari filed in this Court by Petitioners.

Respondents sought leave to file their complaint with the district court in forma pauperis and their motion was granted by the court on March 28, 1974.

Respondents sought leave to appeal the adverse determination of the district court in forma pauperis and that motion was granted by the court on April 20, 1978.

Respondents sought leave to proceed in this Court in forma pauperis and that motion was granted by this Court on June 11, 1979.

MICHAEL THOMPSON
Legal Aid of Western Missouri
1103 Grand Avenue
Kansas City, Missouri 64106
(816) 474-6750

Attorney for Respondents

No. 81-1133

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MISSOURI BOARD OF PROBATION AND PAROLE,
DICK MOORE, Chairman,
CAROLYN V. ATKINS,
and,
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JAMES E. WILLIAMS
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Individually and on Behalf of All Other
Persons Similarly Situated,
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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AFFIDAVIT OF MICHAEL THOMPSON

STATE OF MISSOURI)
) SS.
COUNTY OF JACKSON)

Michael Thompson, being duly sworn, deposes and states:

1. I am a member of the Bar of this Court and have represented the respondents herein since 1974.

2. James E. Williams and Junior Theobald were granted parole subsequent to commencement of this action but prior to trial, in 1975 and 1978 respectively.

3. Counsel have been unable to maintain contact with Junior Theobald since his release, but James E. Williams has remained in contact at all times since the commencement of this action.

4. Following his release on parole, Mr. Williams relocated to Indianapolis, Indiana, where, last year, he was discharged from parole. In the fall of 1981, Mr. Williams advised me that he and his family were moving to Florida.

5. Upon receipt of the Petition for A Writ of Certiorari filed herein, I attempted to contact Mr. Williams for the purpose of preparing an affidavit of indigency to be submitted in connection with a motion for leave to proceed in forma pauperis,

but to date have been unsuccessful in doing so.

6. On prior occasions, Mr. Williams has executed affidavits demonstrating his indigency and copies are attached hereto.

7. Based on conversations with Mr. Williams, I do not believe his economic status has changed materially since his affidavit was filed with this court in February, 1979, and to the best of my knowledge he is unable to pay the costs of opposing the Petition for A Writ of Certiorari yet he desires to continue to prosecute his claims.

8. I shall continue to attempt to contact Mr. Williams in order to obtain an affidavit containing the information required by Rule 46 of this Court and shall submit it to the Clerk of the Court as soon as it is obtained.

9. The issues presented in this action continue to affect the members of the class represented by Mr. Williams and I will continue to represent Mr. Williams and those he represents.

Michael Thompson
MICHAEL THOMPSON

Subscribed and sworn to before me, a Notary Public this 1st day of February, 1982.

Notary Public

My Commission Expires: May 16, 1985

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-950

MISSOURI BOARD OF PROBATION AND PAROLE, CAROLYN V. ATKINS, Chairman, W. R. VERMILLION and DICK MOORE, Members of the Board,

Petitioners,

vs.

JAMES E. WILLIAMS and JUNIOR THEOBALD, Individually and on Behalf of All Other Persons Similarly Situated,

Respondents.

AFFIDAVIT OF JAMES E. WILLIAMS

UNITED STATES OF AMERICA)
) ss
WESTERN DISTRICT OF MISSOURI)

James E. Williams, being duly sworn deposes and says:

1. I am a citizen of the United States and the plaintiff in the above-entitled action.

2. I desire to file my brief in opposition to the Petition for a Writ of Certiorari from the judgement of the United States Court of Appeals for the Eighth Circuit filed in this Court by petitioners on December 13, 1978, but because of my poverty I am unable to pay the costs of printing said brief and still be able to provide myself and my dependents with the necessitities of life.

3. I believe that I am entitled to the relief granted me by the judgement of the United States Court of Appeals for the Eighth Circuit and believe that my case is meritorious.

WHEREFORE, affiant prays that he may have relief to proceed in this Court in forma pauperis.

James E. Williams
JAMES E. WILLIAMS

Subscribed and sworn to before me, a Notary Public, this 11th day of January, 1979.

My commission expires: 4-1-82

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Motion for Leave to Proceed In Forma Pauperis was served upon the Missouri Board of Probation and Parole, Dick Moore, Chairman, Carolyn V. Atkins, and Bill Duncan by depositing said document in a United States Postal Service mailbox, with first-class postage prepaid, addressed to counsel of record for those parties at their post office address:

John Ashcroft,
Attorney General

Paul Robert Otto
Assistant Attorney General

Broadway State Office Building
P.O. Box 899
Jefferson City, Missouri 65102

Michael Thompson
Attorney for Respondents